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In the Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES E. ROEMER, II,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
VOL. I

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QUESTION PRESENTED

As part of an undercover "sting operation" federal agents posed as corrupt businessmen eager to pay bribes to state public officials and ultimately obtained the agreement of such a state official to accept a bribe in violation of state law. Thereafter the masquerading agents acting on their own initiative and at their own direction drafted, addressed and mailed a letter to the official. In the subsequent prosecution of that official, the government relied upon that mailing to transform the state bribery into federal mail fraud and in turn relied upon that federal mail fraud as the second predicate crime, beyond the state bribery itself, necessary to charge a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act (RICO). By the government initiated mailing, a simple state bribery was thus multiplied into two crimes, a federal mail fraud and a state bribery, and then alchemized into a RICO offense with drastically enhanced penalties.

Should the government, either as a matter of statutory construction, federal jurisdiction, due process or otherwise, be permitted to rest a federal criminal prosecution upon a use of the mails entirely confected and effected by its own agents in the course of a masquerade designed by those agents.

PARTIES

The parties to the proceeding in the court of appeals were the respondent United States, the petitioner Charles E. Roemer, II, and Carlos Marcello, a co-defendant with Roemer.[1]

[1] Marcello's application for rehearing was denied by the court of appeals two weeks later than Roemer's. Counsel for Roemer understands that Marcello intends to petition this Court for a writ of certiorari and that in doing so, Marcello will raise an issue concerning the RICO "enterprize" element of the indictment, the proof, and the instructions. In the event Marcello files a petition for certiorari, Roemer hereby adopts any such issues by reference.

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OPINIONS BELOW:

There were two opinions in the district court, *United States v. Marcello*, 508 F.Supp. 586 (E.D.La. 1981) (pre-trial motions (Appendix B) and *United States v. Marcello*, 537 F.Supp. 1364 (E.D.La. 1982) (post-trial motions) (Appendix C). The latter opinion, addressing issues raised herein, concluded with the observation that, "The legal and factual contentions asserted by the defendants for the most part raise serious and in some respects significant questions of law, policy, and priorities." *Id.* at 1386.

The opinion of the court of appeals affirming the defendant's conviction is reported as *United States v. Roemer*, 703 F.2d 805 (5th Cir. 1983) (Appendix A).[2]

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[2] The circuit court's brief affirmance, essentially deferring to the district court's opinions, abdicated the appellate court's supervisory and educational role on "serious" and "significant" issues. In so doing

JURISDICTION:

This is a criminal case. Pursuant to 28 U.S.C. §1254(1) the defendant Roemer invokes the jurisdiction of this court to review the judgment of a court of appeals in a criminal case.

The court of appeals entered its judgment affirming the defendant's conviction and sentence on April 11, 1983. A petition for rehearing en banc was timely filed on April 25, 1983, and was denied by the court on May 16, 1983. This petition for certiorari is timely filed within the 60 days afforded by Rule 20.1, Supreme Court Rules.

STATUTORY AND CONSTITUTIONAL PROVISIONS:

Mail fraud, 18 U.S.C. §1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered

(Footnote 2 continued)
the Fifth Circuit continued a lower court tradition that has seen the RICO statute stretched to applications far beyond its apparent meaning. See, Tarlow, "RICO, The New Darling of the Prosecutor's Nursery", 49 FORDHAM LAW R. 165 (1980).

by the postal service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned for not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 673; May 24, 1949, c. 139, §34, 63 Stat. 94; as amended Aug. 12, 1970, Pub. L. 91-375, §6(1) (11), 84 Stat. 778.

Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §1961, et seq.:

§1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs which is chargeable under state law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code:...section 1341 (relating to mail fraud)...(C) any act which is indictable under title 29, United States Code,...or (D) any offense involving fraud connected with a....

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of the prior act of racketeering activity.

* * *

§1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Louisiana public bribery, LSA-R.S. 14:118:

§118. Public bribery

Public bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment or duty:

(1) Public officer or public employee;....

* * *

The acceptance of, or the offer to accept, directly or indirectly, anything of apparent present or prospective value, under such circumstances, by any of the above named persons, shall also constitute public bribery.

Whoever commits the crime of public bribery shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

Amendment V, United States Constitution:

...nor shall any person...be deprived of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE:

Proceedings:

Roemer and his co-defendant Carlos Marcello, together with three others, were defendants in a 12 count indictment that was the product of a year long undercover sting operation in which two FBI agents posed as corrupt insurance agents eager to pay bribes in return for obtaining state insurance contracts.[3] After an 18 week jury trial, Roemer and Marcello alone were convicted of a single count charging a RICO conspiracy, 18 U.S.C. §1962(d), an agreement to operate an enterprise through a "pattern of racketeering activity", a term which requires the commission of, or agreement to commit, two criminal acts.[4] Roemer was sentenced to three years imprisonment; Marcello was sentenced to seven.

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[3] In its basic nature this operation, named Brilab, resembled the contemporaneous Abscam operation on the east coast. Abscam, however, involved matters principally of direct federal concern, the corruption of congressmen; Brilab, without some further federal connection, involved matters of only local concern, the corruption of state officials; it is the way a mailing was contrived to federalize the matter that is at the heart of this petition. Additionally, Abscam involved no actual public injury; Brilab involved actual federal corruption and distortion of a state election.

[4] Roemer and Marcello were acquitted of all substantive counts in the indictment among them mail fraud, 18 U.S.C. §1341, wire fraud, 18 U.S.C. §1343, and Travel Act, 18 U.S.C. §1952, charges and also a RICO substantive offense, 18 U.S.C. §1962(c), charging the operation of an enterprise through a pattern of racketeering activity.

Facts:

In the spring of 1979 the FBI set in motion an undercover sting operation expressly designed "to criminally involve labor officials" but ultimately involving public officials. Two FBI agents and an informant posed as employees of Fidelity Financial Consultants, a fictitious creation of the FBI, and as representatives of the Prudential Insurance Company of America, one of the largest insurance companies in the world.[5] In those roles, the agents and the informant[6] trumpeted their willingness to share enormous insurance commissions, as much as a hundred thousand dollars a month, with anyone who would help them place insurance contracts. Taking advantage of prior involvements of the informant, the agents allied themselves with the defendant Marcello.

In September 1979, through their relationship with Marcello, the agents and the informant were introduced to various public officials in Louisiana, among them the defendant Charles E. Roemer, II. Roemer was then both the Commissioner of Administration for the State of Louisiana and the campaign manager and chief fundraiser for a major candidate for governor in a hotly contested

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[5] In advertising a connection with Prudential, the government violated the terms of an agreement it had reached with that private company. *United States v. Marcello*, 537 F.Supp. at 1367, n. 3.

[6] The informant Joseph Hauser, characterized by the trial court as a "career con man", 537 F.Supp. at 1367, was paid a salary of $75,300 by the government over a 19 month period and through the government's intervention was effectively able to escape punishment on a 10 count federal indictment charging him with theft of $3.5 million. In his eagerness to serve, Hauser, whose conversations were electronically recorded, on three occasions simply manufactured conversations calculated to incriminate important individuals among them the then Attorney General of the United States, a leading candidate for governor of Louisiana and Marcello himself. 537 F.Supp. at 1371-1373.

campaign that was then in full swing.[7] Viewing the evidence in the light most favorable to the government, Roemer thereafter agreed to accept a share of future insurance commissions in return for his assistance in getting the state insurance contracts placed through the agents' fictitious agency. With this agreement, the crime of bribery in violation of state law was complete.[8] LSA-R.S. 14:118, *supra*, p. 4.

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[7] The involvement of the government and its agents in that election is notable. Ostensibly as campaign contributions, the agents and the informant gave ten thousand dollars to a gubernatorial candidate who narrowly missed the two-person run-off, ten thousand dollars to a gubernatorial candidate, who narrowly made that run-off, and twenty-five thousand dollars to the defendant. Although it is disputed whether the contribution to the defendant Roemer was spent on the campaign, there has been no suggestion that the other contributions were not so spent and neither of those candidates was prosecuted. Additionally, the informant in acting out his part falsely told candidates that other candidates had been corrupted by him. These lies, which could ruin a candidate and distort an election, as similar government lies destroyed the 1972 candidacy of Edmund Muskie, were justified by the government as being a "part of the ruse".

Without any pre-existing reason to believe that any state candidate or official was corrupt, without considering what the state bribery and election laws were, without a warrant or probable cause, and without advising anyone in the state until months after the election, the government simply decided that a state election was the appropriate occasion for it to engage in a masquerade pursuant to which it would scatter about federal money, and federal lies and misinformation, without any regard whatsoever for the potential effect on the democratic process. As such this FBI sting operation raises serious concerns about the proper relationship between the states and the federal government and the limits, due process or supervisory, that should be imposed on such operations. See, *infra*, pp. 20-22.

[8] Roemer's defense was that his agreement in this regard was not a genuine one, since he knew the contract didn't provide for commissions and that, even if it did, it wouldn't provide commissions at the level suggested by the agent. Roemer asserted that he was simply going along with the agents in order to secure a twenty-five thousand dollar campaign contribution for the campaign of which he was chairman. See, n. 7, *supra*.

The interactions concerning the insurance contract between Roemer, the agents, the informant and Marcello lasted through the balance of 1979 and involved several personal meetings and phone calls. At the beginning, the informant had suggested that he might make a "proposal" to Roemer, detailing the insurance services his agency could provide. In ensuing conversations, there were continued references to the proposal by all parties. From time to time, when pressed by the informant, the agents or Marcello as to how the deal was progressing, Roemer would inquire where the proposal was. On a single occasion, there was a discussion as to how the proposal might be delivered and Roemer suggested that he would meet the informant at the airport and pick it up personally or that the informant could leave it with Marcello and that Roemer could get it from Marcello. Neither then, nor at any other time, was there any discussion about using the mails to deliver the proposal.

In early November, 1979, for their own reasons,[9] the agents decided that it was appropriate to get some kind of proposal to Roemer and, acting on their own, they decided that the way to do it was with a letter. To that end, in their Los Angeles office, the agents typed a transmittal letter to Roemer. The letter was on the spurious letterhead of the insurance agency and was addressed to Roemer with a complete mailing address that detailed a post office box and a zip code, both essential for mail delivery and for no other purpose. The agents then brought the letter to New Orleans. When they arrived there, they enlisted the help of Marcello's secretary and directed her to retype the letter that they had already prepared because of a typographical

[9] The agents professed a concern that if they didn't appear to press Roemer on the contract, Marcello, with whom they were pursuing other matters, might become suspicious.

error and to type an enclosure to accompany that letter.[10] After they then involved the secretary in addressing the envelope, the predictable occurred. Possessed of a signed letter, complete with inside address, post office box and zip code, Marcello's secretary, as would any other, asked the informant and the agents whether they wanted her to mail it for them. To which the government informant said yes; and the government agents said yes; and indeed the government agents even suggested express mail. A letter designed by the government to be mailed was thus mailed at the direction of the government. The exact conversation was as follows.

> DECKER (Secretary): You want me to have him [Wacks, the agent] sign it?
>
> HAUSER (Informant): Let me have, let him sign it. *Address the envelope, and then...*
>
> DECKER (Secretary): And I'll...
>
> HAUSER (Informant): Then uh.
>
> DECKER (Secretary): *You want me to mail it for you?*
>
> HAUSER (Informant): *Would you mail it? I'd appreciate it very much.*
>
> WACKS (Agent): Sign it.
>
> DECKER (Secretary): Yeah.
>
> MONTEGUT (Agent): *Express mail.*
>
> HAUSER (Informant): No she's going to mail it.

[10] The agents conveniently carried blank letterhead with them for these purposes.

DECKER (Secretary): If you mail it,...I'll mail it at the post office today, it's okay.

MONTEGUT (Agent): Oh really. Okay, that's fine.

G. 109T, pp. 8-9.

It was government agents who designed and created a letter to Roemer; and it was government agents who, in response to a secretary's question, directed that the letter be placed in the United States mails. Roemer, of course, had no involvement in the actual mailing itself and had never in any way indicated any desire to receive the proposal by the mails. Marcello, likewise, had no involvement in the preparation of the letter or in the decision to mail it. After Marcello learned, however, that the agents had prepared the letter and were mailing it, he decided to call Roemer. In that telephone conversation, Marcello stated that the proposal had been prepared and then told Roemer (falsely) that it had been mailed the preceding day. To Marcello's statement Roemer responded simply, "Okay. That's good then", and the conversation ended.[11]

The decision to write a letter, the decision to put an address on the letter, the decision to include a post office box and a zip code, the decision to direct the secretary to mail the letter, were all decisions exclusively reached and implemented by the federal agents and the federal informant. By their act of will alone was a letter created and a letter mailed. That government created mailing was the critical and substantive element of the government's case

[11] Having committed himself to Roemer that the proposal was in the mail, Marcello thereafter indicated that he hoped that the letter was mailed right away; the record does not establish whether the letter was then already in the mail.

against Roemer and whether it can serve in that role is the issue presented by this petition.

ARGUMENT:

RICO is the acronym for the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, et seq., a statute directed at persons who commit a series of crimes in pursuit of some activity or "enterprise".[12] At its heart is the "pattern of racketeering activity" describing the commission of two or more specified criminal acts. 18 U.S.C. §1961(1) and (5). Among the criminal acts that may qualify as predicate crimes for the "pattern of racketeering activity" are state violations of state bribery statutes, §1961(1)(A), and federal violations of the federal mail fraud statute. §1961(1)(B). The substantive RICO offense, 18 U.S.C. §1962(c), requires proof that a defendant committed two or more criminal acts, constituting a pattern of racketeering activity; the conspiracy RICO offense, 18 U.S.C. §1962(d), requires proof that a defendant agreed to commit two or more criminal acts, constituting a pattern of racketeering activity. *United States v. Martino*, 648 F.2d 367, 383, 396 (5th Cir. 1981). Roemer was convicted of the conspiracy offense.

It is conceded that the evidence established that Roemer, by his agreement to divide commissions, agreed to commit one criminal act, bribery in violation of state law. The issue in this case concerns the existence of an agreement to commit a second criminal act: specifically, whether the government's own orchestrated mailing can legally and constitutionally serve as the basis for finding an agreement to commit a second criminal act, mail fraud. Under the

[12] The enterprise aspect has been addressed by the Court in *United States v. Turkette*, 101 S.Ct. 2524 (1981).

indictment that mailing was charged as mail fraud, the bribery scheme being the fraud and the mailing being in furtherance; and the allegation that Roemer had agreed to commit such mail fraud was charged as the second criminal act essential to the RICO conspiracy count on which Roemer was convicted.[13] The government's accusation that Roemer is chargeable under the mail fraud and RICO statutes with agreeing to commit a mailing evidenced solely by a letter that was conceived, chosen and executed by government agents, acting independently of Roemer, is the linchpin of the government's case. It is the key element that at the same time both federalizes the underlying state offense and gives birth to the second offense necessary for a RICO prosecution. As a matter of law and policy, that linchpin must be recognized as an artificial and insufficient contrivance.

Statutory:

As a matter of statutory interpretation and suffici-

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[13] As drawn, the indictment originally recited seven possible predicate acts for the substantive and conspiracy RICO charges. Three of those acts were charges of state bribery which the district judge found to constitute the single offense of state bribery conceded above. 537 F.Supp. at 1381-1382. Two acts were separate substantive counts of wire fraud on which the district judge granted judgments of acquittal. Only three acts, therefore, went to the jury, one was the state bribery; one was the mail fraud discussed at length here; and one was a count of wire fraud. Although the wire fraud charge can also be attacked on the grounds of manufactured and artificial jurisdiction raised here (the use of interstate wires arose solely because at the time of a phone call by Marcello, the informant was out of state), the focus in this petition is on the mail fraud charge because, under established principles of conspiracy law, if an indictment charges multiple objects of a conspiracy, and if the law cannot allow conviction under one of those objects, then the conspiracy conviction cannot stand absent some proof that the jury did not rely on the legally invalid object. *Van Liew v. United States*, 321 F.2d 664, 672 (5th Cir. 1963); *United States v. Dansker*, 537 F.2d 40 (3rd Cir. 1976); *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981). See, 537 F.Supp. at 1382, n. 48.

ency of evidence, the mailing at issue here cannot be permitted to form the basis of a prosecution either for mail fraud, or derivatively for RICO, for to do so allows the government indiscriminately to furnish the substantive element of a criminal offense and to multiply those offenses. Under *Pereira v. United States*, 347 U.S. 1 (1954), a person is guilty of mail fraud only when he acts "with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen" and is guilty of conspiracy only when there "is an agreement to use the mails to defraud".[14]

The government has sought to justify its reliance on the mailing in two ways. First, the government has argued that some sort of mailing was in any event generally forseeable given the fact that the entire scheme involved insurance contracts placed with large interstate businesses. Second, the government has argued that Roemer's assent to Marcello's announcement that the proposal was in the mail constituted Roemer's own agreement to the crime.

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[14] In discussing the propriety of relying on the government supplied mailing, either in statutory terms as here or in jurisdictional and due process terms, *infra*, pp. 17-22, it is important to distinguish the mailing element of the mail fraud statute from the federal element of most federal statutes. In *United States v. Feola*, 420 U.S. 671 (1975), the Court held that where a defendant's knowledge of the federal element (there the fact that a person assaulted was a federal officer) need not be shown to establish the substantive offense, it likewise need not be shown to establish the conspiracy offense. As *Pereira* shows, however, mail fraud does not fall into that category; knowledge, or the imputed knowledge that comes from forseeability, is an essential element. The mailing in mail fraud, unlike identity in *Feola* and interstate transportation in other crimes, is thus not a "merely jurisdictional" fact whose only "consequence is the choice of judicial forum", *Feola* at 685; the mailing is the crime itself, and an element which in some cases alone renders a scheme criminal. The issue raised here involves much more than a government charade in which a "merely jurisdictional" federal element is supplied; it involves a government charade in which a substantive element, albeit jurisdictional as well, is furnished.

Both arguments fail.

As to the first, Roemer was not charged with some generalized agreement to commit a fraud in which some mailing at some time might foreseeably occur;[15] he was charged with an agreement to commit mail fraud with reference to the specific mailing that occurred only because government agents willed it to occur. The actual mailing was the key to the allegation of foreseeability. As to the second argument, Roemer's acknowledging response to Marcello's announcement that the proposal was in the mail is utterly neutral and unremarkable; any citizen is going to react in precisely the same way to the announcement that something has been mailed to him.[16] Indeed, the only person who would object to a mailing would be a criminal so sophisticated that he knew he should stay away from mailboxes altogether.[17]

Basically, the government's argument is that so long as the use of the mails is in some general sense foreseeable in whatever undercover operation it confects or so long as a defendant does not object to the use of the mails, then government agents are free on their own to initiate mailings. These circumstances or conditions, however, define

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[15] Defendant knows of no case in which a conspiracy to commit mail fraud was charged when there was not in fact a mailing, although theoretically such a charge might be brought at least if the agreement specifically contemplated the mails. Compare *Feola*, *supra*, at 695-696.

[16] In any event there is no legal or rational support for the idea that a citizen's after the fact acquiescence in an act constitutes a before the fact agreement to commit it.

[17] In this regard it should be noted that the predisposition aspect of the traditional entrapment defense provides no protection to the citizen; virtually everyone is predisposed to using the mails and so under entrapment analysis there is no way a citizen can complain that he was lured into using the mails.

no limits. What undercover sting operation within the general parameters of "white collar" crimes, indeed what operation of any complexity, does not sooner or later involve the possibility of using the mails, if only as here for a communication between "co-conspirators"? What citizen, criminal or otherwise, objects to the receipt of something in the mail?

There are no limits under the government's argument. Agents are free to initiate mailings and when they do so those defendants with whom they are involved may be charged on the basis of each and every such mailing with as many mail fraud offenses as there are government mailings and even with RICO offenses. To premise mail fraud prosecutions on mailings such as that here eliminates the mailing element of the crime. Foreseeability ceases to be an element determined by the acts and plans of the wrongdoers; it becomes what it is not supposed to be, see, *supra*, p. 14, n. 14, a "merely jurisdictional" element satisfied by the unilateral act of a federal agent who may simply hasten to the mailbox and base foreseeability on his own choice to mail a letter.

To premise RICO prosecutions on such mailings is even more pernicious for it allows the enhanced penalties of that statute to be triggered by a government agent's choice to multiply crimes by mailing letters rather than by a defendant's personal commission or agreement to commit additional crimes. The very premise of RICO is that it should only reach those persons who have the double mental element associated with the commission of two crimes, persons who distinguish themselves by their willingness to commit a "pattern" of crimes, persons who are twice guilty. If the government's own letter in circumstances like these can supply that second crime, then the statutory

requirements of RICO become meaningless.

Jurisdictional:

There are limits to the power of government agents to contrive and manufacture the substantive elements of crimes that alone make those crimes subject to federal prosecution. Those limits were recognized in the seminal opinion of Judge Friendly in *United States v. Archer*, 486 F.2d 670 (2nd Cir. 1973). Those limits were exceeded in that case and they have been exceeded here.

In *Archer*, FBI agents staged a state arrest and then paid bribes to state officials to secure dismissal of the resulting state indictment; as a consequence, an assistant district attorney was charged in federal court with bribery under the Travel Act, 18 U.S.C. §1952. The jurisdictional predicate to the charge was the fact that the defendant had made one or more interstate or foreign telephone calls. Rejecting one phone call because it had been contrived for jurisdictional purposes and one because it was purposeless, the *Archer* court found the remaining call from the undercover agent to the defendant "insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States". 486 F.2d at 683. Without resolving that ultimate question, the court held that,

> [W]hen the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves;...

Id. at 685-686.

and found that the single phone call which it characterized as "a casual and incidental occurrence" and "a matter of happenstance" to be an insufficient action to meet that standard.

The defendant has canvassed all the RICO cases and all the cases raising *Archer* issues.[18] There is simply no case in which the exercise of federal jurisdiction and the application of federal substantive law is so totally dependent upon elements furnished through government agents acting on their own initiative and at their own direction. Like *Archer*, the jurisdictional and substantive reed upon which this case perches is simply too slender, too insubstantial and too much the product of the government's own contrivances rather than the defendant's own acts.

In recent years there has been well-reasoned criticism of the government's increased assertion of jurisdiction over local matters purely premised on mailings, wire communications and travel of only incidental significance.[19] In *United States v. Craig*, 573 F.2d 455

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[18] *Archer* has received widespread acceptance, although no other court has yet reversed a conviction on its basis. *United States v. Perrin*, 580 F.2d 730 (5th Cir. 1978); *United States v. Pecora*, 693 F.2d 421 (5th Cir. 1982); *United States v. Gambino*, 566 F.2d 414 (2nd Cir. 1977); *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978); *United States v. Jannotti*, 673 F.2d 578 (3rd Cir. 1982); *United States v. Tucker*, 481 F.Supp. 182 (E.D.N.Y. 1979); *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975); *United States v. O'Connor*, 635 F.2d 814 (10th Cir. 1980); *United States v. Hall*, 536 F.2d 313 (10th Cir. 1976). Each of these cases involved existing criminal activity that either directly implicated federal concerns or invited federal participation. In none, with the possible exception of *Jannotti*, was there an entirely FBI confected scheme to create a federal crime out of local behavior. Even in *Jannotti* the FBI did no more than supply the "merely jurisdictional" interstate commerce element of a crime, compare *Feola*, *supra*, not as here the substantive mailing itself.

[19] See, e.g., *United States v. Williams*, 621 F.2d 123, 126 (5th

(7th Cir. 1977) (dissenting opinion), Judge Swygert described the conceptual contortions undergone by federal prosecutors as they sift through files, documents, letters and phone calls searching for some small peg on which to hang their big case. There can be little doubt that the government here went through the same process.[20] But the situation here has gone one step further still. When the

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(Footnote 19 continued)
Cir. 1980) (Tate, J., concurring); *United States v. Curry*, 681 F.2d 406, 425 (5th Cir. 1982) (Garwood, J., concurring); *United States v. Pecora*, *supra* (Brown J., concurring and dissenting); *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977) (Swygert, J., dissenting); *United States v. Wander*, 601 F.2d 1251 (3rd Cir. 1979) (Aldisert, J., dissenting).

[20] Wrote Judge Swygert:

> Once the investigation is completed, consideration is then given to what federal offense, if any, has been committed. The mail fraud statute? The federal travel act? The investigation files are searched to find some mailings or evidence of interstate travel. The United States Attorney's office sifts through the mailings in the file and then constructs a legal theory in order that they may be used to form the basis for a charge of mail fraud. One fortuitous trip, totally incidental and unforseen, by an unindicted coschemer forms the basis of the two travel act counts. A conspiracy count is, of course, added. In this fashion, the mail fraud statute and the travel act are subverted to purposes for which they were never intended. No longer are the mailings and travel considered essential or an integral part of the scheme; they are seen and used as mere technicalities which are necessary to obtain federal jurisdiction. Naturally, the public is pleased, and rightfully so, that corrupt public officials have been brought to book. But what of the prosecutor's responsibility to use the federal criminal laws only in a manner in which they were intended? Once the prosecutor determines that federal jurisdiction is lacking, his responsibility lies in cooperating with the state law enforcement officials and aiding the state in prosecuting the guilty. When he seeks convictions for crimes that are not within the federal jurisdiction, he acts irresponsibly and not in keeping with his high office. The court should not condone.
>
> 573 F.2d at 505.

hundreds of hours of tapes and conversations were analyzed, viewed, reviewed and reviewed again, the mailing that the prosecution finally found was there only because the government created it. This case has stretched federal jurisdiction the last step. The government need no longer search for a federal connection; it may now simply create that connection itself by using the mails.

Congressional and constitutional policies counsel against judicial and executive measures that "transform relatively minor state offenses into federal felonies", and "alter sensitive federal-state relations". *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Bass*, 404 U.S. 336, 349 (1971).[21] Those policies are merely empty slogans if crimes can be denominated federal not because of acts committed by defendants and not because of definitions of those crimes, but because federal undercover agents are free to create and furnish federal elements whenever and wherever they please. In the present case the federal agents and the prosecution went too far when, acting alone, they supplied the mailing upon which the government relied not merely to transform a state offense into a federal offense but to transform it into the two-crime "pattern of racketeering activity" punishable under RICO by 20 years imprisonment.

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[21] In *Williams*, *supra*, Judge Tate recognized that while bribery of a state official was conduct roundly to be condemned, absent required interstate elements it should be subject to prosecution only under state law.

> Much as we may deplore such conduct and wish for its extirpation and punishment, respect for our federal system demands that, in the absence of congressional intent validly exercised, local criminal conduct be punishable through prosecution by the state rather than by the central government.
>
> 621 F.2d at 126.

Due Process; Supervisory Power:

For there to be mail fraud, there must be a use of the mails; the use of the mails is the essential element that makes fraudulent conduct a crime punishable under 18 U.S.C. §1341. While it is not necessary, of course, that a defendant himself use the mails, it is necessary that a defendant "cause" the use of the mails, a standard he is held to have met when a "foreseeable" mailing actually occurs. *Pereira, supra.* Every such mailing is an independent offense; but until there is a mailing, the crime has not occurred. Here, government agents, by their own choice so to manipulate their charade and without any direction from a defendant, chose to employ the mails and thus to create the use of the mails without which there would have been no federal crime and no RICO crime.[22] Reliance on such government manipulated mailings to create crimes with which to charge citizens and to multiply crimes so as to employ statutes like RICO goes too far and should be proscribed either under due process principles or under the Court's supervisory power.

In *Hampton v. United States*, 425 U.S. 484 (1976), although a plurality of the Court held that government over-involvement could be challenged only through the traditional entrapment defense focused on predisposition, a majority of the Court recognized that in appropriate cases government over-involvement requires scrutiny under the due process clause or under the Court's supervisory power.[23] Such scrutiny is appropriate here.

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[22] Presumably had the underlying state bribery been a misdemeanor and thus not qualify as a predicate crime under 18 U.S.C. §1961(1), the government agents could have mailed two letters to satisfy the "pattern" requirement of RICO.

[23] Opinion of Powell, J., joined by Blackmun, J., concurring in

In concurring in *Hampton*, Justice Powell observed that the Court had not yet had occasion "to confront Government over-involvement in areas outside the realm of contraband offenses". 425 U.S. at 493. Justice Powell, acknowledging Judge Friendly's opinion in *Archer*, recognized that different considerations might be involved.

> Judge Friendly recently expressed the view: "[T]here is certainly a [constitutional] limit to allowing government involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of citizens is a course that courts should be extremely reluctant to sanction." *United States v. Archer*, 486 F.2d at 676-677.
>
> 425 U.S. at 493, n. 4.

The government masquerade in the instant case did precisely such injury to the rights of the citizenry. In this respect the case is different from the private charades of the Abscam cases. Here the free election for a state's highest office was irreparably distorted by federal agents who distributed tens of thousands of dollars to state candidates for governor and who disseminated scandalous lies and misinformation about these candidates. See n. 7, p. 7, *supra*. All of this was done to prove that it could be done, not because of some specific complaint about possible wrongdoing and not on the basis of any evidence that some

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(Footnote 23 continued)
the judgment, 425 U.S. at 491; opinion of Brennan, J., joined by Stewart, J. and Marshall, J., dissenting, 425 U.S. at 495.

actual criminal conduct was taking place.[24] It is difficult to conceive of a federally directed ruse more injurious to the rights of citizens in a democratic society, or more insensitive to the nature of federal and state relations.

The government's involvement, in the crime itself, goes even further than it did in *Hampton*. Here, the government has arrogated to itself the power not simply to create the opportunity and to furnish the implements for a crime but to create the crime itself, and as many counts thereof as it wishes, simply by choosing to mail letters. The crime itself has ceased to be the individual's act; it has become the government's invention.[25]

CONCLUSION

The RICO conspiracy conviction of the defendant Roemer has undeniably involved an extreme example of federal "investigative" activity, one that raises serious policy questions about the existence of limits upon the power of federal agents to manipulate and create federal crimes. These issues are potentially at the heart of each and every "white collar" undercover sting operation that the federal government chooses to produce and direct. The mailing on which the government contrived to base a RICO prosecution in this case can find its way into any scheme the government chooses. As this case evidences, those schemes are becoming increasingly grand and sophisticated. There must surely be limits to the government's

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[24] There is thus not the same justification for extreme law enforcement measures as is the case in narcotics trafficking. Compare 425 U.S. at 495, n. 7 (Powell, J., concurring).

[25] "*It was with the purpose* of protecting the public against [frauds] and to *prevent the post office from being used to carry them into effect, that this statute was passed.*" *Durland v. United States*, 161 U.S. 306, 315 (1896).

ability to confect a "white collar scam" and then to run to the mailbox and indict for mail fraud, or to make that run twice and indict under RICO.

The case presents the question of those limits, a question that given the increased number of these kind of government masquerades and the progressively expanding view of the RICO net is worthy of this Court's full consideration.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I, John R. Martzell, a member of the bar of this Court, hereby certify that copies of this petition for certiorari have been served on the respondent United States of America by mailing three copies thereof, postage prepaid, to the Solicitor General, Department of Justice, Washington, DC 20530, and three copies to John Volz, Esq., U.S. Attorney, 500 Camp Street, New Orleans, LA 70130, and on the co-defendant Carlos Marcello by mailing three copies thereof, postage prepaid, to Arthur A. Lemann, III, 400 Lafayette Street, New Orleans, LA 70130, this_____day of June, 1983.

_____

JOHN R. MARTZELL

83-29

NO.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES E. ROEMER, II,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI VOL. II—APPENDIX A, B, C, D, E

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APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Charles E. ROEMER, II and Carlos Marcello,
Defendants-Appellants.

No. 82-3040

United States Court of Appeals,
Fifth Circuit

April 11, 1983.

Following the denial of defendants' pretrial motion to dismiss, 508 F.Supp. 586, defendants were convicted before the United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 537 F.Supp. 1364, of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, and their motion for judgment of acquittal or for new trial was denied, and they appealed. The Court of Appeals held that: (1) affidavit in support of Government's application for electronic surveillance was adequate; (2) Government did not artifically create federal jurisdiction; (3) evidence sustained conviction; (4) jury instructions correctly and adequately stated the law; and (5) evidence sustained finding that the hand written notes of FBI agent prepared after a meeting with one of the defendants did not constitute a "statement" which prosecution was required to disclose to defendant, and because the report which was released to defendant was substantially identical to the notes, any error in failing to disclose the notes would have been harmless.

Affirmed.

Glass & Reed, John W. Reed, John R. Martzell, New Orleans, La., for defendants-appellants.

Arthur A. Lemann, III, New Orleans, La., for Carlos Marcello.

John P. Volz, U.S. Atty., L. Eades Hogue, Asst. U.S. Atty., Albert J. Winters, Jr., 1st Asst. U.S. Atty., John Voorhees, Dept. of Justice, Strike Force, New Orleans, La., for plaintiff-appellee.

Before GOLDBERG, GEE and RANDALL, Circuit Judges.

PER CURIAM:

Appellants Roemer and Marcello were convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d) (1976). On appeal they argue (1) the affidavit in support of the government's initial application for electronic surveillance was inadequate; (2) the government artificially created federal jurisdiction; (3) the evidence was insufficient to support their convictions; and (4) the jury instructions incorrectly stated the law. Also, we have carried with the case a motion to disclose material pursuant to the Jencks Act, 18 U.S.C. § 3500 (1976).

We have carefully examined the briefs, all portions of the record directed to our attention by the parties or the opinions of the court below, and all authorities cited by the parties or the opinions of the court below. We have found

that the verdicts below are supported by the law and evidence and must be affirmed. This case has been thoroughly briefed and well handled by all parties from the earliest stages, and all of the arguments presented to us on the four points of alleged error were also presented to the trial court below. The trial court was conscientious and thorough in its exposition of the law and we affirm the judgments below based upon the portions of the trial court's opinions relating to the four points of appeal. *United States v. Marcello*, 508 F.Supp. 586, 601-07 (E.D.La. 1981) (affidavit); *United States v. Marcello*, 537 F.Supp. 1364, 1367, 1369-77 (E.D.La. 1982) (artificial creation of jurisdiction); *id.* at 1379-80, 1382-84 (sufficiency of evidence);[1] *id.* at 1384-86 (jury charge).

This case carries with it a motion to unseal handwritten notes of an FBI agent prepared after a meeting with Roemer and subsequently incorporated into a standard "302" report. The 302 was produced under the Jencks Act, 18 U.S.C. § 3500 (1976), but the notes were not. The issue before us is whether the notes were a statement by the agent, who testified at trial. To be a statement, the notes must be "signed or otherwise adopted" by the agent. *Id.* § 3500(e)(1). The trial court found that the notes were not a

[1] In particular, there was sufficient evidence to support the finding of agreement by Roemer to commit mail fraud. "It was not necessary to prove that [the defendant] actually did the mailing, 'he need only have had a reasonable basis to foresee that his actions would result in the use of the mails.' " *United States v. Martino*, 648 F.2d 367, 401 (5th Cir.1981), *cert. denied*, __ U.S. __, 102 S.Ct. 2006, 72 L.Ed.2d 465 (1982), __ U.S. __, 102 S.Ct. 2007, 72 L.Ed.2d 465 (1982), __ U.S. __, 102 S.Ct. 2020, 72 L.Ed.2d 474 (1982) (quoting *United States v. Georgalis*, 631 F.2d 1199, 1206 (5th Cir. 1980)). As the trial court below stated, the evidence in this case "shows not only the expectation that the mail and interstate phone calls would be used to further the scheme, but also the defendants' assent and approval of the use of those means of effecting the plan." *United States v. Marcello*, *supra*, 537 F.Supp. at 1384.

statement, observing that the notes were full of abbreviations and difficult to interpret. The trial court also found that the 302 was almost totally duplicative of the rough notes.

One circuit has held that rough notes are not statements. *See, e.g., United States v. Griffin*, 659 F.2d 932, 937-38 (9th Cir.1981), *cert. denied*, __ U.S. __, 102 S.Ct. 2019, 72 L.Ed.2d 473 (1982); *United States v. Spencer*, 618 F.2d 605 (9th Cir. 1980). Other courts have held to the contrary. *See, e.g., United States v. Walden*, 465 F.Supp. 255, 259-61 (E.D.Pa.1978), *aff'd*, 590 F.2d 85 (3rd Cir.) *cert. denied*, 444 U.S. 849, 100 S.Ct. 99, 62 L.Ed.2d 64 (1979); *United States v. Hilbrich*, 232 F.Supp. 111 (N.D.Ill.1964), *aff'd*, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941, 85 S.Ct. 1775, 14 L.Ed.2d 704 (1965). This circuit has not adopted any hard or fast rule, but has consistently held that a determination of whether a writing was a statement was a factual determination to be reversed only if clearly erroneous. *See, e.g., United States v. Cole*, 634 F.2d 866, 867 (5th Cir.), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981); *United States v. Medel*, 592 F.2d 1305, 1317 (5th Cir.1979); *United States v. Cathey*, 591 F.2d 268, 274 (5th Cir.1979). Our circuit has noted that the roughness of the notes may be relevant to a finding that they were not adopted by the author as a statement. *See United States v. Surface*, 624 F.2d 23, 26 (5th Cir.1980); *United States v. Jiminez*, 484 F.2d 91, 92 (5th Cir.1973).

Given the trial court's proper reliance on the roughness and abbreviations of the notes, its finding that the notes were not a statement is not clearly erroneous and must be affirmed. In any event, because the released 302 is substantially identical to the retained notes, had there been error it would have been harmless. *United States v.*

supra, 624 F.2d at 26; *United States v. Medel*, *supra*, 592 F.2d at 1316-17; *United States v. Jiminez*, *supra*, 484 F.2d at 92.

AFFIRMED.

APPENDIX "B"

UNITED STATES of America

v.

Carlos MARCELLO et al.

Crim. A. No. 80-274.

United States District Court,
E.D. Louisiana.

Jan. 9, 1981

In prosecution resulting from a Justice Department undercover "sting" operation, defendants filed pretrial motions to dismiss indictment or to suppress evidence allegedly illegally obtained. The District Court, Sear, J., held that: (1) transcripts and evidentiary records did not indicate that grand jury process had been affected by alleged Government-initiated leaks to news media or by any misconduct by Government attorneys, thus evidentiary hearing on motion to dismiss was not necessary; (2) evidence established that informer was mentally capable of freely and voluntarily consenting to recording of his conversations with defendant and that he did so; (3) since early wiretap orders formed basis for findings of probable cause as to later wiretap orders, all defendants had standing to challenge the wiretap orders, even though not all defendants were subjects of the early orders; (4) affidavits supporting wiretap in investigation of criminal activity relating to corrupt influence and bribery in public employee insurance contracts provided magistrates with sufficient evidence to warrant finding of probable cause; (5) records disclosed no intentional or reckless misrepresentations or omissions such as would render affidavits insufficient to establish probable

cause; and (6) motion for disclosure of identity of informer would be denied, where defense failed to demonstrate relevance of informer's identity to case and his defense, since the information which informer provided was itself irrelevant to the case.

Order accordingly.

John P. Volz, U.S. Atty., E. D. La., L. Eades Hogue, U. S. Dept. of Justice, Albert Winters, Richard T. Simmons, Asst. U. S. Attys., John Voorhees, U. S. Dept. of Justice, New Orleans, La., for United States.

Russell J. Schonekas, New Orleans, La., Henry Gonzalez, Tampa, Fla., for Marcello.

Thomas R. Dyson, Jr., Washington, D. C., Frank DeSalvo, New Orleans, La., for Davidson.

Michael S. Fawer and Matthew H. Greenbaum, New Orleans, La., for Roemer.

Arthur A. Lemman, III, New Orleans, La., for Marinello.

Risley Triche, Napoleonville, La., for Young.

SEAR, District Judge.

I. *Introduction*

Defendants in a government prosecution resulting from the Justice Department's undercover "sting" operation code-named "BRILAB" have brought various pretrial

motions to dismiss the indictment against them or, failing that, to suppress certain evidence which they contend was illegally obtained. The defendants first move to dismiss the indictment because of what they characterize as governmental overreaching and jurisdiction artificially created by the government. They also contend in these motions that prejudicial publicity resulting from leaks to the news media of grand jury proceedings is so pervasive that they are entitled to dismissal of the indictment. In addition, defendant Carlos Marcello seeks dismissal on the ground that he is a victim of arbitrary and discriminatory selective prosecution. In the second group of motions, defendants seek suppression of their recorded communications obtained by the government with the consent of an informer, Joseph Hauser, or pursuant to wiretap orders issued by United States District Judges in the District of Columbia and the Eastern District of Louisiana. In addition to the motions to suppress, the second group of motions includes one brought by Marcello for disclosure of the name of the individual who provided the government with confidential notebooks and telephone logs allegedly stolen from him in a 1977 burglary.

Arguments on the motions to dismiss and other preliminary motions[1] were heard on October 6 and 7, 1980.

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[1] Prior to the hearing conducted the week of October 6, 1980, and again before the hearings held the week of December 8, 1980, the defendants moved to adopt the substantive motions and the motions to suppress of their co-defendants, and I granted the motions to adopt. In addition to the motions discussed in the text of this minute entry, the defendants brought various motions in October to dismiss the indictment and to strike portions of the indictment. I denied these motions orally from the bench. Motions for review of the discovery orders issued by United States Magistrate Ingard O. Johannesen were also argued and decided at the October hearings. *See* Minute Entry filed November 4, 1980. In addition, defendants Charles Roemer, I. Irving Davidson, Vincent Marinello and Aubrey Young argued that their prosecutions

At that time rulings on some of these motions were deferred until the trial or following any post-trial hearings that might be necessary. During the week of December 9, 1980, extensive evidentiary hearings were held on the motions to suppress and defendant Marcello's motion for disclosure. Because of the number of motions, the uniqueness of some, and the necessity of maintaining an orderly record, there is a need to explain my rulings on the motions to suppress and the motion for disclosure, as well as to elaborate on my prior rulings on the motions to dismiss.

II. *Background of the Case*

On June 17, 1980, defendants Carlos Marcello, I. Irving Davidson, Vincent Marinello, and Charles Roemer were indicted by a federal grand jury in the Eastern District of Louisiana. A fifth defendant, Aubrey Young, was added as a defendant in a superseding indictment issued by the grand jury on August 14, 1980. In the lengthy, twelve-count indictment, the defendants are charged with various violations of federal law allegedly uncovered in a Justice Department undercover operation commonly known as BRILAB. The investigation, whose acronym stands for "bribery-labor," centered upon suspected illegal activities involving public officials, labor unions and reputed organized crime figures in the Southwest. The BRILAB operation in Louisiana lasted about one year from February 1979 to February 1980, a period during which the 1979 Louisiana gubernatorial campaign and election were held. As part of the investigation, two FBI agents posed as representatives of a fictitious Beverly Hills, California firm called Fidelity Financial Consultants. The agents were aided by Joseph

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(Footnote 1 continued)
should be severed from the trial of defendant Carlos Marcello. I denied the motions to sever orally from the bench.

Hauser, a cooperating individual who had pleaded guilty on February 5, 1979 to federal charges arising out of his involvement in an insurance swindling scheme.

In this prosecution defendants are charged with involvement in a criminal enterprise for the purpose of obtaining insurance contracts from state and local governments, labor unions, and at least one private business by committing various criminal acts. In general the defendants are charged with (1) a conspiracy to obtain insurance contracts by committing criminal acts in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1962(c); (2) a substantive violation of RICO, 18 U.S.C. § 1961(4), in that the defendants were allegedly "associated in fact" as an "enterprise" to obtain insurance contracts by committing criminal acts; (3) violations of the federal mail fraud statute, 18 U.S.C. § 1341; (4) violations of the federal wire fraud statute, 18 U.S.C. § 1343; and (5) interstate travel or transportation in aid of racketeering in violation of 18 U.S.C. § 1952.

III. *Motions to Dismiss*

Among the motions argued by the defendants on October 6 and 7, 1980 were four whose determination they contend requires extensive evidentiary hearings. First, the defendants seek to dismiss the indictment on grounds of "governmental overreaching" and prosecutorial misconduct. They contend that the acts charged in the indictment were all part of a scheme initiated, controlled, planned and executed by the government itself in violation of their constitutional rights to due process of law. Second, the defendants submit that the indictment should be dismissed because federal criminal jurisdiction was artificially created by the government, which they argue concocted,

created and supplied the interstate commerce aspects necessary to allege a federal offense. Third, defendant Marcello seeks to dismiss the indictment as to him on grounds that the government engaged in discriminatory selective prosecution. Marcello contends that for years government prrosecutors have arbitrarily labeled him as chief of a Louisiana organized crime syndicate and boss of the "Mafia" or "La Cosa Nostra." Marcello argues that this false label prompted the government to create the scheme charged in the indictment for the express purpose of fraudulently inducing Marcello in particular into the scheme in violation of his Fifth and Fourteenth Amendment rights to due process and equal protection of the law. Finally, defendants seek dismissal of the indictment on grounds that they were severely prejudiced by government-initiated leaks to the press. They contend that these leaks enabled newsmen to write and broadcast reports about the pending BRILAB grand jury investigation creating unfair and prejudicial pre-indictment and pretrial publicity which rendered further proceedings fundamentally unfair. Alternatively, the defendants ask that the government officials responsible for the news leaks be held in contempt pursuant to Fed.R.Crim.Pro. 6(e).

Each of these motions contemplates a broad evidentiary hearing at which the defendants would examine government officials, witnesses and documents in hopes of establishing prosecutorial misconduct so egregious that the resulting indictment must be dismissed as a violation of defendants' constitutional rights. In anticipation of the contemplated evidentiary hearings, the defendants subpoenaed the Attorney General of the United States, one of his chief deputies, the director of the FBI and one of his assistants, United States attorneys, FBI agents, and the government's chief witness and informer, Joseph Hauser.

In addition, they subpoenaed members of the press whose news stories appeared prior to and during the grand jury investigation and which defendants contend prejudiced them.

A) *Governmental Overreaching and Artifically Created Jurisdiction*

The motions alleging governmental overreaching and artificially created jurisdiction share a common legal basis and require substantially similar proof. For each of these motions, defendants seek an evidentiary hearing to elicit the testimony of government officials and informers who were involved in the BRILAB investigation or its supervision. The threshold issue in the resolution of these motions is whether claims of governmental misconduct and artificially created jurisdiction present cognizable defenses to a criminal prosecution. I find that each does.

Ordinarily, a criminal defendant's allegation of governmental overreaching or prosecutorial misconduct arises in the defense of entrapment. When a defendant pleads the defense of entrapment, he has the burden of showing that law enforcement officials induced him to commit a crime that he was not predisposed to commit and that the government implanted the criminal design in his mind. *United States v. Russell*, 411 U.S. 423, 433, 436, 93 S.Ct. 1637, 1643, 1645, 36 L.Ed.2d 366 (1973); *United States v. Anderton*, 629 F.2d 1044, 1047 (5th Cir. 1980); *United States v. Wolffs*, 594 F.2d 77, 79-80 (5th Cir. 1979). A claim of governmental overreaching, however, is a distinct and different defense in which the defendants contend that the government's involvement in the BRILAB scheme was so pervasive and outrageous that due process principles or the court's power of supervision over the criminal justice

system require that the indictment be dismissed.

The Supreme Court on two occasions has declined to reverse a criminal conviction on grounds of governmental overreaching. There is language, however, in *United States v. Russell, supra*, and in the concurring and dissenting opinions in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), suggesting that the Court might be willing to accept the defense of governmental misconduct in an appropriate case. In *Russell*, the Court upheld the conviction for illegal manufacture of drugs even though an undercover agent had supplied him with an essential ingredient. The Court stated, however:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction,...the instant case is distinctly not of that breed.... The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the due process clause of the Fifth Amendment.

411 U.S. at 431-32, 93 S.Ct. at 1643. In *Hampton*, the Court upheld a conviction for heroin distribution, and Justice Rehnquist, writing for a three-justice plurality of the Court, completely rejected the governmental misconduct defense. 425 U.S. at 489-90, 96 S.Ct. at 1650. The concurring and dissenting opinions noted, however, that police overinvolvement in a crime could bar prosecution on due process grounds where the misconduct reached a "demonstrable level of outrageousness." *Id.* at 495 n.7, 96 S.Ct. at 1653 n.7.

Several courts of appeals have recognized that in some circumstances convictions obtained through egregious misconduct by government agents involved in the creation and maintenance of criminal activities would be vacated. *See United States v. Twigg*, 588 F.2d 373, 381 (3d Cir. 1978); *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973); *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971). The Fifth Circuit has agreed that in certain situations, a defense of governmental misconduct, separate and distinct from the defense of entrapment, may bar a criminal prosecution on due process grounds. In *United States v. Graves*, 556 F.2d 1319, 1324 (5th Cir. 1977), *cert. denied*, 435 U.S. 923, 98 S.Ct. 1485, 55 L.Ed.2d 516 (1978), the court ruled that "[t]here is still available in appropriate cases a governmental misconduct defense grounded on the dual principles of due process and the supervisory powers of the court, but such a defense does not fall within the narrow confines of 'entrapment' as that term has been explicated in *Russell* and *Hampton*." Therefore, without deciding the merits of defendants' motion at this time, I conclude that the motion to dismiss the indictment on grounds of governmental overreaching presents a cognizable and legitimate defense.

Similarly, defendants' motion to dismiss on grounds of artificially created jurisdiction also presents a cognizable legal defense. The RICO statute itself makes clear that an effect on interstate commerce is an essential element of the federal offenses charged in the indictment. *See* 18 U.S.C. § 1962(a), (b), and (c). The motion to dismiss on grounds of artificially created jurisdiction is factually related to defendants' governmental overreaching argument in that they contend that government overinvolvement in the scheme resulted in the creation and maintenance of the interstate commerce elements of the

offense charged in the indictment.

In *United States v. Archer, supra*, federal and local law enforcement officers created an undercover operation to investigate suspected corruption and public bribery in the New York City criminal justice system. Two assistant district attorneys were eventually convicted of violations of the Federal Travel Act, 18 U.S.C. § 1952, but the Second Circuit reversed the convictions. In its original opinion, the court held that

> when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings.... [M]anufactured jurisdiction "is a reflection of the federal judicial system which brings it into disrepute."

486 F.2d at 682 [citations omitted]. On rehearing, the Second Circuit tempered somewhat the breadth of its language, pointing out that its decision "in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here." *Id.* at 685-86.

The Fifth Circuit was faced with a similar motion to

dismiss a Travel Act indictment on grounds of artificially manufactured jurisdiction in *United States v. Perrin*, 580 F.2d 730 (5th Cir. 1978), *aff'd*, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). In *Perrin*, the court rejected the defense under the particular facts of that case, but it recognized the validity of the defense in a proper case when it stated that the "defendants' argument that the government improperly obtained jurisdiction is for the court to determine as a matter of law...." *Id.* at 737. Therefore, again without passing on the merits of the motion, I conclude that the defendants' motion to dismiss on grounds of artificially created jurisdiction also presents a cognizable claim.

The two defense motions discussed above are not patently frivolous; their determination will require an evidentiary basis of some sort. Each motion looks to a determination of whether the government acted unlawfully, and each places in controversy the facts surrounding the government's conduct in this case. Without evidence, I cannot make the findings of fact, or draw the legal conclusions necessary to decide defendants' motions. Therefore, having determined that these motions raise legitimate defenses in law to criminal prosecutions, I also conclude that an evidentiary hearing must be conducted. The remaining question is when such a hearing should be conducted.

Fed.R.Crim.Pro. 12(b) provides that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." The rule then enumerates five kinds of motions which *must* be raised prior to trial. Included are defenses and objections "based on defects in the institution of the prosecution" and "defenses and objections based

on defects in the indictment or informationn." In *United States v. Covington*, 395 U.S. 57, 89 S.Ct. 1559, 23 L.Ed.2d 94 (1969), the Supreme Court interpreted substantially similar language in the forerunner of the present Rules 12(b). In *Covington*, the Court stated that a defense is capable of determination without trial of the general issue "if trial of the facts surrounding commission of the alleged offense would be of no assistance in determining the validity of the defense." *Id.* at 60, 89 S.Ct. at 1561. The Court noted that the rule permits factual hearings prior to trial "if necessary to resolve issues of fact peculiar to the motion." *Id.*

Under Fed.R.Crim.Pro. 12(e), however, I have the discretion to defer for good cause the determination of such motions until the trial or after the verdict. The rule provides:

> A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

The legislative history of Rule 12(e) indicates that the Supreme Court initially proposed that the rule allow a court "to defer ruling on a pretrial motion until the trial of the general issue or until after the verdict" without mention of "good cause." H.R.Rep.No.94-247, 94th Cong., 1st Sess., *reprinted in* [1975] U.S.Code Cong. & Ad. News 674, 679-680. In reviewing the Supreme Court's proposals, however, the Committee on the Judiciary of the House of

Representatives modified the Supreme Court's proposal to permit a court to defer its ruling on pretrial motions only for good cause. The Committee's chief concern was that a court not be allowed to defer its ruling if to do so would adversely affect a party's right to appeal, especially the government's right to appeal pursuant to 18 U.S.C. § 3731. The House Judiciary Committee intended its amendment to "discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary." H.R.Rep.No.94-247, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad.News 674, 6a80.

The question here is whether there is "good cause" within the meaning of Rule 12(e) to defer conducting an evidentiary hearing and ruling on defendants' motions until trial of the case or after the verdict is rendered.

Although there is very little case law addressing the issue of whether evidentiary hearings on motions like these must be conducted prior to trial and whether the motions must be decided pretrial, I find some guidance for my decision in two recent cases. In *United States v. Criden et al.*, Crim. No. 80-166 (E.D.Pa., Aug. 18, 1980) (Fullam, J.), the court was faced with a similar motion to dismiss the indictment on grounds of governmental misconduct in one of the Justice Department's ABSCAM prosecutions.[2] Judge Fullam conducted several days of evidentiary hearings on various motions brought by the defendants; nevertheless, he concluded that resolution of the governmental mis-

[2] ABSCAM is a code name for an undercover operation carried out by the Justice Department at about the same time as the BRILAB investigation. In ABSCAM, FBI agents set up an operation called Abdul Enterprises, Inc., and posed as representatives of Middle Eastern businessmen who sought assistance from public officials for business enterprises.

conduct issue had to be deferred until trial when a full and complete record would be available. In *United States v. Barletta*, 500 F.Supp. 739 (D. Mass., 1980) (Tauro, J.), the government brought a motion prior to retrial of a multi-count indictment to admit evidence consisting of tape recordings of telephone conversations between the defendant and a government informer. The court decided to defer conducting an evidentiary hearing or ruling on the motion until trial. While the motion at issue in *Barletta* differs from those before me, I find that the interests supporting deferral in *Barletta* are applicable here. In *Barletta*, Judge Tauro said:

> It makes sense that pretrial proceedings be designed to avoid, whenever possible, the time-consuming chore of hearing the same evidence twice, first before and then during trial....
>
> * * * * * *
>
> Rule 12 was designed to avoid the wasteful duplication of effort inherent in the government's theory that would mandate pretrial determinations of motions to admit without regard to any good cause there may be to defer.... Our courts are overburdened. Judges, therefore, have an obligation to expend judicial resources prudently. This includes ensuring that valuable court time is not wasted. A determination to defer in order to avoid such waste is manifestly one made for good cause....
>
> * * * * * *
>
> A precedent mandating that a district judge hear the same evidence twice would be an imprudent imposition on the limited resources of the judicial system.

Id., at 742, 744, 747.

In this case, defendants seek an "unfettered" inquiry into the conduct of government officials. *See* defendants' joint supplemental memo of Oct. 9, 1980. The allegations of government misconduct before me at this time are vague, and to permit an unstructured inquiry without limitation at this stage of the proceeding would require hearings which could last as long as the trial itself, with the defendants hoping to uncover some wrongdoing by government agents or officials. The facts that describe the government's undercover operation, the offenses attributed to the defendants in the indictment, and the alleged acts of misconduct imputed to government officials by the defendants are intertwined. In my judgment, they cannot be successfully disentangled. Most of the facts that the defendants want to prove at a hearing will be elicited during the complex and lengthy trial anticipated by both sides. This point is best illustrated by the close relationship between the defendants' claims of governmental overreaching and the classic defense of entrapment. *See generally United States v. Graves, supra*, 556 F.2d at 1321-24. Although the court in *Graves* pointed out that the defense of governmental misconduct "grounded on the dual principles of due process and the supervisory powers of the court" is separate and distinct from the defense of entrapment, *id.* at 1324, the facts supporting the overreaching defense appear to be included within the entrapment defense. Although in *Graves* the Fifth Circuit left no doubt that it was not error to consider the governmental misconduct defense pretrial, *id.* at 1322-23, the court did not require that the motion be disposed of pretrial or that evidentiary hearings concerning the motion be conducted pretrial.

I am sensitive to the concerns expressed by counsel for defendant Marcello at oral argument that insofar as defendants' motions would dispose of the case and spare

defendants the long ordeal and expense of trial if they are granted, the evidentiary hearing should be conducted and a ruling made on the motions now. These are important concerns which I do not brush aside lightly. I find, however, that in the context of this factually complex case, the best course to protect both the defendants constitutional rights and society's interest in the just and efficient administration of criminal justice is to defer resolution of the motions until trial of the case. At the time of the trial, I can assess the full panoply of facts, including the conduct of the FBI undercover agents and government attorneys who conducted the investigation and the nature of the interstate commerce elements of the offenses charged in the indictment. The trial will also provide an opportunity for counsel to define more precisely the areas of inquiry that support their contentions, which at this time are rather vague. Moreover, resolution of the issues presented by defendants' motions may require that defendants themselves testify regarding the impact of the alleged overreaching or the existence of relationships required in the interstate commerce element of the offense. If I find that further hearings appear necessary or appropriate as a result of the trial, they will be ordered immediately. The interests of the defendants and of society are best served if these serious motions are determined on the basis of a full evidentiary record and a complete understanding of the facts of this complex case. Therefore, I conclude that the evidentiary hearing and resolution of these motions must be deferred until trial.

In addition, counsel for defendant Marinello contended during oral argument of his separate motion to dismiss that the RICO offenses charged in Counts I and II of the indictment failed to state an effect on interstate commerce as required by the RICO statute because Fidelity Financial

Consultants, the California firm set up by the Justice Department as part of the investigation, was a purely fictitious operation through which insurance contracts could never have been written. I requested that counsel for the government and defendant Marinello submit supplemental memoranda on the issue. As counsel for Marinello notes in footnote 1 of his supplemental memorandum, this argument is in fact closely related to defendants' joint motion to dismiss on grounds of artificially-created jurisdiction. Since I have deferred until trial my ruling on the motion to dismiss on grounds of artificially-created jurisdiction, I will also reserve judgment on this argument until that time. In all other respects, the motion to dismiss brought individually by defendant Marinello is denied.

B) *Selective Prosecution*

Defendant Marcello's motion to dismiss the indictment on grounds of discriminatory and arbitrary selective prosecution stands in a slightly different procedural posture from the two motions discussed above. Like those motions, the motion to dismiss for selective prosecution raises a cognizable defense to a criminal prosecution. The Fifth Circuit has ruled, however, that a defendant bears a heavy burden of establishing, at least *prima facie*, that (1) he has been singled out for prosecution while others similarly situated have not generally been proceeded against for similar conduct, and (2) the government's discriminatory selection of him for prosecution has been invidious or in bath faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *See United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United states v. Kahl*, 583 F.2d 1351, 1353 (5th Cir. 1978). There has been some disagreement among the circuits, however, over the

second prong of the test stated above. Some decisions have indicated that relief may be available when intentional or purposeful discrimination is practiced against an individual, even though the discrimination is not class-based. *See United States v. Torquato*, 602 F.2d 564, 569 n.9 (3d Cir. 1979), *cert. denied*, 444 U.S. 941, 100 S.Ct. 295, 62 L.Ed.2d 307 (1980); *United States v. Falk*, 479 F.2d 616, 619 (7th Cir. 1973).

Criminal prosecutions are generally presumed to have been undertaken in good faith and nondiscriminatorily, *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978); *United States v. Falk*, *supra*, 479 F.2d at 620, and the burden of proving discriminatory selective prosecution is on the defendant. Several courts have held that in order to minimize intruding on the largely discretionary prosecutorial function while still enabling defendants effectively to raise claims of selective prosecution, the defendant is obligated to make a threshold showing of discriminatory prosecution before an evidentiary hearing will be conducted on this defense. *In re Grand Jury*, 619 F.2d 1022, 1030 (3d Cir. 1980); *United States v. Torquato*, *supra*, 602 F.2d at 569-70, *and cases cited therein*. Before a hearing will be conducted, some credible evidence must be adduced showing that the government intentionally and purposefully discriminated against the defendant. *Id.* at 570. In *Torquato*, for example, the Third Circuit denied defendant's request for a post-trial evidentiary hearing on the question of selective prosecution, finding that even after a full trial on the merits, defendant had failed to show a sufficient factual basis to require that an evidentiary hearing be held. *Id.* at 572.

In this case, defendant Marcello has not preliminarily adduced any credible evidence of his discriminatory

selective prosecution by the government. Defendant's motion papers contain speculation that the prosecution is in some way tied to government "frustration" over its inability to prevail in a deportation proceeding presently pending against Marcello. The motion also asserts without any apparent evidentiary backing that the government has arbitrarily and falsely labeled Marcello as an Organized Crime chieftain. Defendant comes closest to adducing some credible evidence of selective prosecution when he argues that some of the consensually obtained tape recordings made by the government with the assistance of its chief informer, Joseph Hauser, show that Marcello was unlawfully selected and pursued by the government as the target of its investigation. Defendant has pointed to no specific conversations on these tapes, however, that would tend to provide the *prima facie* showing he must make to be entitled to a full evidentiary hearing on this issue.

Shortly after I made my oral ruling deferring an evidentiary hearing and resolution of defendants' overreaching and artificially created jurisdiction motions until trial, counsel for defendant Marcello requested that I also defer ruling on his motion to dismiss on grounds of selective prosecution, and I have agreed to defer it. It may be that some evidence will be adduced at the trial that will be useful in deciding this motion or that will require that I conduct further evidentiary hearings after the trial.

C) *Prejudicial Publicity*

Defendants' motion to dismiss the indictment, or alternatively for sanctions, on grounds that they were prejudiced by government-initiated leaks to the news media also requires that I determine whether extensive pretrial evidentiary hearings must be conducted. Defendants first

contend that pre-indictment publicity engendered by leaks to the press by government sources so tainted the grand jury process that their Fifth Amendment rights to fundamental fairness and due process of law have been irreparably impaired. The alternative of defendants' motion seeks sanctions because government officials who leaked information to the news media violated Fed.R.Crim.Pro. 6(e), internal guidelines of the United States Justice Department, and Rules 13.1 and 13.2,[3] Local Rules of the United States District Court for the Eastern District of Louisiana. Defendants' request for an evidentiary hearing on this part of their motion is clearly governed by the Fifth Circuit's decision in *In re Grand Jury Investigation, T. Bertram Lance v. United States Department of Justice* (the *Lance* case), 610 F.2d 202 (5th Cir. 1980). In a thorough and well-reasoned opinion, *Lance* provides guidelines to the general question of when to hold an evidentiary hearing on alleged violations of the traditional policy of grand jury secrecy. After reviewing the existing evidentiary record

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[3] Local Rule 13.1 provides:

> It is the duty of the lawyer for each of the parties not to release or authorize the release of information or opinion in connection with pending or imminent criminal litigation with which he is associated, for dissemination by any means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

Local Rule 13.2 provides:

> When there is a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statements for dissemination by any means of public communication that goes beyond the public record or that is not necessary to inform the public that the investigation is under way, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, or to warn the public of any dangers, or otherwise to aid the investigation.

and analyzing the factors outlined in the *Lance* case, I conclude that no further evidentiary hearing is required and that insofar as defendants' motion seeks dismissal of the indictment, the motion is denied.

I note initially that the evidentiary record that already exists provides evidence determinative of this motion. The defendants initially submitted as exhibits attached to their motions fifteen newspaper articles and one transcript of a television newscast, all of which were released between February and June 1980 when the media frequently reported on the pending BRILAB investigation. The defendants later supplemented these with several other newspaper articles from publications across the country. In addition, I have received and reviewed affidavits submitted by seven government attorneys denying that they disclosed matters concerning the investigation to any unauthorized persons and also denying any knowledge that any other participants in the investigation disclosed secret matters. At my request, I was also provided with a copy of the so-called Blumenthal Report, an extensive document prepared by the Justice Department which reviews in detail its confidential and internal investigation aimed at discovering the sources of leaks to the news media that ocurred during the government's principle "sting" operations, including BRILAB. Finally, at defendants' request, I have reviewed transcripts of the proceedings of the grand jury that returned the indictment in this case. In addition to this evidence, defendants had subpoenaed at the time of the hearings on this motion several members of the press whose news stories appeared during the investigation and a number of Justice Department attorneys and officials, presumably to elicit their testimony about the source of news leaks. Based on the arguments of counsel and the evidence already at my disposal, I decided those subpoenaed

need not testify at this time.

While *Lance* involved facts different in several respects from those here, its teachings are applicable. *Lance* requires that in determining whether the moving party has established a *prima facie* case of prejudicial and unlawful leaks of secret grand jury information sufficient to require a broad evidentiary hearing, a court must consider five factors. First, there must be a clear indication that the media reports disclose information about matters occurring before the grand jury. 610 F.2d at 216. In this case some of the articles about which defendants complain rely for their sources on defendants themselves, *see e.g.*, defendants' exhibit F or on court documents and records. *See, e.g.*, defendants' exhibit A, paragraph 1; defendants' exhibit N. Some do appear, however, to disclose information about matters occurring before the grand jury. *See, e.g.*, defendants' exhibits L, M, O, P.

Second, the articles must "indicate the source of the information revealed to be one of those proscribed by Rule 6(e)." *Id.* at 217. Those sources include grand jurors, court reporters, typists, government attorneys, and other government officials to whom disclosure may be made under the rule. Scattered throughout the articles submitted by the defendants are references to "sources close to the investigation," "Federal sources," "Justice Department sources" and simply "sources." No reference is made in any of the articles to a particular person or persons, and in some of the articles, high-ranking officials in the Office of the United States Attorney and the FBI are reported to have specifically refused to comment or give out details on the investigation. *See, e.g.*, defendants' exhibit D. However, in determining whether these vague origins

actually implicate sources prohibited by Rule 6(e), it is necessary to consider the nature of the material disclosed. *Id.* at 217-18. In some instances, it is reasonable to infer from the nature of the disclosure made that the "sources" referred to in the article are included within those enumerated in Rule 6(e).

Third, "in assessing the what and who of disclosure at the *prima facie* case stage, the court must assume that all statements in the news report are correct." *Id.* at 219. I have done so in this case.

Fourth, the nature of the relief requested and the extent to which it interferes with the grand jury process must be considered. A defendant seeking dismissal of an indictment "bears a heavy burden in attempting to justify such relief." *Id.* On the other hand, a *prima facie* case requiring a hearing on whether to impose sanctions does not require as strong a showing. In this case, defendants seek both forms of relief—dismissal and contempt sanctions.

Fifth, the court must weigh any evidence presented by the government to rebut the assumed truthfulness of reports which otherwise make a *prima facie* case of misconduct. *Id.* at 219. In *Lance*, government attorneys provided no evidence denying misconduct and the court found that the articles presented by Lance in support of his motion made a sufficient *prima facie* case to warrant an evidentiary hearing "*in the absence of any affidavit* by the Justice Department attorneys denying that they, their associates, or their superiors divulged the information appearing in the newspaper articles." *Id.* at 220-21 (emphasis added). The absence of affidavits appeared to be a key factor in the court's decision to remand the *Lance* case to the district court for a factual analysis of "whether the showing made

by Lance would still warrant an evidentiary hearing even if a responsive affidavit should be filed by government counsel." *Id.* at 221. I note in this case that while I have received affidavits from seven government attorneys who conducted the grand jury investigation locally, I have received nothing from the FBI agents or other government officials who may have been privy to the grand jury proceedings.

Insofar as defendants' motion seeks dismissal of the indictment, the fourth and fifth factors of the *Lance* test weigh heavily against conducting any further evidentiary hearing. As *Lance* points out, a "criminal defendant who seeks to obtain dismissal of an indictment...bears a heavy burden in attempting to justify such relief." *Id.* at 219. This heavy burden requires a showing of prejudice to the defendants or abuse of the grand jury process by the government. *See United States v. Thomas*, 593 F.2d 615, 623 (5th Cir. 1979); *United States v. Malatesta*, 583 F.2d 748, 753-54 (5th Cir. 1978), *cert. denied*, 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). Defendants have failed to bear that heavy burden in this case. I have examined carefully the transcripts of the grand jury proceedings, and I have found nothing to indicate that the grand jury process which led to these indictments was in any way affected by publicity or by any misconduct by government attorneys. Instead, the indictment appears to have been the result solely of the evidence that was presented to the grand jury. My review of these transcripts and the existing evidentiary record convinces me that an evidentiary hearing on the motion to dismiss is unnecessary and that no abuse of the grand jury process resulting in prejudice to the defendants occurred. Therefore, the motion to dismiss the indictment on these grounds is denied.

Defendants' motion for sanctions, however, presents a slightly different situation. The *Lance* case notes that a defendant's burden in showing a *prima facie* case sufficient to require an evidentiary hearing on a motion for sanctions does not require as strong a showing as the motion to dismiss. The defendants have submitted newspaper articles and a broadcast transcript, portions of which appear to satisfy the first three elements of the *Lance* standard for conducting an evidentiary hearing. On the other hand, the government has submitted affidavits rebutting the assumed truthfulness of the news reports. Moreover, I have reviewed the Blumenthal Report, and found it inconclusive at best since it buttresses the government's affidavits in some respects and the defendants' claims in others. In *Lance* the Fifth Circuit remanded the case to the district court for factual analysis of whether the preliminary showing would warrant an evidentiary hearing if the government filed responsive affidavits. In this case, the government has filed affidavits which are only partially responsive. Rule 6(e) imposes an obligation of secrecy not only on government attorneys, but also on FBI officials and others who participate in the grand jury proceedings. I have deferred my ruling on defendants' motion for sanctions. The government may supplement its proffer, if it can, by filing, no later than February 2, 1981, affidavits of FBI agents or other officials who participated in the grand jury proceeding. At that time I will again review the materials submitted by defendants, the affidavits, and the Blumenthal Report to determine what further action, if any, by way of evidentiary hearing or court-ordered investigation is appropriate.

IV. *Motions to Suppress the Consensually Recorded Tapes*

Central to the government's case are the electron-

ically recorded conversations between informer Joseph Hauser and some of the defendants. The defendants argue that the tapes were unlawfully obtained because Hauser's consent was not given freely and voluntarily, knowingly and understandingly, and they are therefore inadmissible. In an effort to compel an evidentiary hearing on the issue of Hauser's consent, the defendants submitted with their motions evidence which they contended constituted a sufficient preliminary showing of Hauser's incapacity to consent. Included in their proffer was a transcript of Hauser's February 5, 1979 guilty plea before the Honorable William C. Frey, United States District Judge for the District of Arizona, *United States v. Hauser*, No. CR-78-313 (D.Ariz., Feb. 5, 1979), to RICO charges arising from a scheme to swindle health, welfare and pension funds from labor unions. Defendants contend the facts surrounding the guilty plea are relevant because it was entered contemporaneously with Hauser's decision to cooperate with the government by taping his conversations. They argued that Hauser made several statements that indicate he could not have knowingly and voluntarily consented to the recordings.[4]

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[4] For example, the defendants point out that Hauser told Judge Frey that as an adolescent in Poland during World War II he was struck on the head with a bar when he tried to escape from an internment camp (defendant Marinello, exhibit 2, plea transcript p. 5). Hauser also said that he had been "under a tremendous pressure" for the last five years and that at the time he changed his plea he was taking twenty pills a day, including Dilantin, Valium, Mellaril and Benzedrine (transcript p. 8). Hauser also said that his doctor told him that at times his medication took away his ability to reason and understand, and that at his physician's suggestion he had seen a psychiatrist for treatment of depression. (Transcript pp. 10-13). It should be noted, however, that despite these problems Hauser assured Judge Frey that he fully understood the proceeding and the charges to which he pleaded guilty, and Judge Frey accepted the plea.

In support of their claim of incompetence, the defendants also submitted the affidavit of Dr. Kenneth Ritter, a psychiatrist who reviewed a portion of Hauser's guilty plea and concluded that some of the drugs Hauser was taking "have the capacity to alter levels of consciousness, awareness, alertness, and mood" and are normally prescribed to treat serious mental or brain disorders that "may profoundly affect a person's capacity to freely give unbiased consent." In addition, defendants pointed out portions of the early consensual tapes in which Hauser said he was under mental and financial pressure. In anticipation of a hearing on the issue of Hauser's ability to consent, defendants subpoenaed Hauser's medical records from his personal physician in California.

On the basis of this preliminary showing and to allow the parties a meaningful opportunity to meet their burdens on this issue, I conducted an evidentiary hearing limited to the question of Hauser's consent. *See generally United States v. Glickman*, 604 F.2d 625, 629, 633 (9th Cir. 1979), *cert. denied*, 444 U.S. 1080, 100 S.Ct. 1032, 62 L.Ed.2d 764 (1980); *United States v. Phillips*, 540 F.2d 319, 324 (8th Cir.), *cert. denied*, 429 U.S. 1000, 97 S.Ct. 530, 50 L.Ed.2d 611 (1976); *United States v. Napier*, 451 F.2d 552 (5th Cir. 1971). At the hearing, the government introduced into evidence seven consent forms executed by Hauser in the presence of FBI agents in which he agree to allow his conversations to be recorded. The government also called as witnesses FBI Agents William Wiechert and Thomas Rupprath, who witnessed the signing of the forms. They testified that Hauser's demeanor at the time he executed the forms was "rational and normal" and that Hauser appeared lucid and in control of his faculties. They also testified that Hauser was not threatened, physically abused, or in any way coerced before signing the forms. Agent

Wiechert said that while he occasionally saw Hauser taking pills, he appeared to be lucid and not suffering from any debilitating effects from the pills.

Over the government's objection, I permitted the defendants to examine Hauser's medical records, and they were reviewed by Dr. Ritter. On the following day, Dr. Ritter testified that the drug dosages Hauser was taking at or about the time of his agreement to consent to the tapings was a "formidable dose of medication" which itself could have affected Hauser's ability to consent, although it was possible for some persons to function quite well under the same dosages. He concluded based on the limited information available to him that it was possible that Hauser might have been incapable of consenting. After being given the opportunity to review the full transcript of Hauser's guilty plea, the doctor testified that it appeared that Hauser understood the exhaustive questioning and the nature and meaning of his plea of guilty at the time.

Finally, I allowed counsel to question Hauser himself as part of the evidentiary hearing. Hauser identified the consent forms and testified that the FBI agents explained them to him, that the agents made no threats or promises to him, and that he understood the nature and content of the forms when he signed them. Hauser testified that although he was taking medication at the time he consented to the recording of his conversations, his senses were not impaired. At the conclusion of Hauser's testimony, the defendants requested that I compel a psychiatric examination of Hauser which I declined on the basis of the evidentiary record. After considering the testimony of the witnesses, the transcript of Hauser's Arizona guilty plea, the documentary evidence submitted by the parties, and having listened to the consensual tape

recordings prior to the hearings, I determined that Hauser's consent to the recording of his conversation was given freely and voluntarily, knowingly and understandingly as required by law.

Knowing and voluntary consent is a requisite to lawful interception of consensually recorded conversations. *See* 18 U.S.C. § 2511(2)(c) and (d); *United States v. Juarez*, 573 F.2d 267, 278 (5th Cir.), *cert. denied*, 439 U.S. 915, 99 S.Ct. 289, 58 L.Ed.2d 262 (1978). Some circuits have stated that consent will ordinarily be established if the government shows merely that the informant engaged in the conversation knowing that it was being taped. *United States v. Glickman*, *supra*, 604 F.2d at 633; *United States v. Fuentes*, 563 F.2d 527, 533 (2d Cir.), *cert. denied sub nom., Sansone v. United States*, 434 U.S. 959, 98 S.Ct. 491, 54 L.Ed.2d 320 (1977); *United States v. Kirk*, 534 F.2d 1262, 1272-73 (8th Cir. 1976), *cert. denied*, 433 U.S. 907, 97 S.Ct. 2971, 53 L.Ed.2d 1091 (1977); *United States v. Bonnano*, 487 F.2d 654, 658-59 (2d Cir. 1973). In *Glickman*, the Ninth Circuit summarized this general approach by saying:

> The extent of proof required to show that an informer consented to the monitoring or recording of a conversation is considerably less stringent than that needed to show consent to a physical search. The reasons for this less stringent standard regarding conversations is that....[a]n informer's consent to the monitoring or recording of a telephone conversation is an incident to a course of cooperation with law enforcement officials on which he has ordinarily decided some time previously and entails no unpleasant consequences to him.
>
> In order to establish consent to taping of conversations, it will ordinarily suffice for the gov-

> ernment to show that the informant engaged in the conversation knowing that it was being taped.

604 F.2d at 633-34 (citations omitted). A panel of the Fifth Circuit, however, has indicated that the validity of an informer's consent to the recording of his conversations must be measured against the more stringent standard of consent to a physical search. In *United States v. Napier*, 451 F.2d 552, 553-54 (5th Cir. 1971), the court cited its decision in *United States v. Elrod*, 441 F.2d 353 (5th Cir. 1971), a case involving the validity of a defendant's consent to a search of his hotel room, as providing the proper standard for determining the effect of mental capacity on the ability to consent to the recording of conversations.[5] In *Elrod*, the court said that "a determination of the question of free and voluntary consent requires a determination that the person was mentally competent to understand the nature of his act *when he signed* the 'Consent to Search' form." 441 F.2d at 355 (emphasis by the court). The court said that the act of consent must be "the consensual act of one who knew what he was doing and had a reasonable appreciation of the nature and significance of his actions." *Id.*

Regardless which standard is applied in this case, however, I conclude that Hauser was mentally capable of freely and voluntarily consenting to the recording of his conversations, and that he did so. The consent forms, the agents' testimony, Hauser's testimony during the evidentiary hearing, and the transcript of his guilty plea, which was accepted by Judge frey, convince me that Hauser's

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[5] In a footnote in *Glickman*, the Ninth Circuit recognized the different standard applied by the Fifth Circuit in *Napier* and *Elrod*, but ruled that *Napier* and *Elrod* were inapposite to the facts of *Glickman*. *See United States v. Glickman*, *supra*, 604 F.2d at 634 n.5.

consent was knowingly and understandingly given. Moreover, one need not listen too long to the tape recordings themselves to become satisfied beyond peradventure of doubt that they were made freely and with full understanding of what was going on. I therefore conclude that the defendants' motions to suppress the consensually recorded conversations must be denied.

In addition to the grounds discussed above, defendant Davidson argues that because (1) Hauser was not acting "under color of law" as required by 18 U.S.C. § 2511(2)(c), and (2) the taping was for purposes of committing criminal, tortious, or injurious acts by Hauser, a person not acting under color of law, and the tapes were therefore unlawfully made under 18 U.S.C. § 2511(2)(d) and must be suppressed. I find that these arguments are without merit. Section 2511(2)(c) provides that it "shall not be unlawful...for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." The courts have generally held that where an informer is acting under the direction and supervision of government investigators, as the evidence indicates Hauser was doing in this case, the informer is acting under color of law within the meaning of the statute. *See United States v. Rich*, 518 F.2d 980, 985 (8th Cir. 1975), *cert. denied*, 427 U.S. 907, 96 S.Ct. 3193, 49 L.Ed.2d 1200 (1976); *United States v. Ransom*, 515 F.2d 885, 890 (5th Cir. 1975), *cert. denied*, 425 U.S. 945, 96 S.Ct. 1687, 48 L.Ed.2d 189 (1976). Since I conclude that Hauser was acting under color of law in this way, it is unnecessary to reach defendant's second argument, which is prefaced on the assumption that Hauser was not acting under color of law, and defendant Davidson's motion to suppress on these grounds is denied.

V. *Motions to Suppress the Court-Ordered Wiretaps*

In their motions to suppress the court-ordered wiretaps, the defendants contend that their tape-recorded conversations made pursuant to wiretap orders issued by United States District Judges under 18 U.S.C. § 2510 *et seq.* are inadmissible for a variety of reasons. Their chief arguments are that (1) the orders authorizing the wiretaps were not founded on a showing of probable cause; (2) FBI agents and government attorneys misrepresented and omitted material facts in the affidavits accompanying the applications for authorization to tap defendants' telephones; and (3) the government did not comply with the requisite statutory provisions permitting wire intercepts. The defendants contend that each subsequent application for a wiretap order in the long series of intercepts authorized in this investigation builds upon the fruits of the previous orders. Thus, defendants have concentrated their challenges[6] on the earliest applications and orders of May 4, June 13, and June 14, 1979.

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[6] It is undisputed in this case that defendants Davidson and Marcello have standing to challenge any and all of the wiretap orders, and they have brought their own motions or adopted the arguments of their co-defendants in seeking suppression of these tapes. The government has challenged the standing of defendants Marinello, roemer, and Young to attack the early wiretap orders on grounds that as to these orders they are not "aggrieved persons" within the meaning of 18 U.S.C. § 2518(10)(a) and *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). I agree, however, with defendants' contention that each subsequent wiretap order issued in the long series of orders in this case built upon previously issued orders to establish probable cause. It is clear that all defendants eventually became "aggrieved persons" at one point or another in the series of wiretap orders. Since the early wiretap orders formed the linchpin upon which all later findings of probable cause and the wiretap orders were based, I conclude that all defendants have standing to raise these challenges to the wiretap orders. Therefore, I have allowed counsel for all defendants to present their arguments on these motions.

The affidavits upon which defendants focus their attack are virtually identical; each can be divided into two sections. In the May 4, 1979 affidavit of FBI Agent Charles Walker, for example, the first 14 paragraphs consist of background information purportedly provided in an April 4, 1979 conversation between Walker and Hauser in which Hauser described past dealings he allegedly had with defendants Marcello and Davidson. The second part of the affidavit contains information purportedly gleaned from recorded telephone and personal communications of Davidson, Marcello and Hauser made by the FBI with Hauser's consent. Walker stated in the affidavit that he had personally reviewed each of the conversations and summarized their content. Walker's May 4 affidavit was included in the application for the initial wiretap order prepared by government attorney Bruce Kelton and submitted to United States District Judge Charles R. Richey in Washington, D.C. It appears in substantially similar form along with another affidavit in which FBI Agent Doug Bird purportedly summarizes additional telephone conversations intercepted pursuant to the May 4 order in the June 13 application, and again above Walker's signature in the June 14 application. Both Walker and Kelton testified extensively during the evidentiary hearings.

A) *Sufficiency of the Affidavits: Probable Cause, Misrepresentations, and Omissions*

Defendants' arguments that the recordings are inadmissible because the orders were not supported by probable cause and because there were material misrepresentations and omissions in the affidavits supporting each wiretap application are somewhat related. Both involve the ultimate question of the sufficiency and validity of the affidavits supporting the determination of probable cause to

wiretap. The arguments require that i inquire into (1) the "facial" sufficiency of the affidavits and whether the hearsay and double hearsay statements in the background paragraphs provided by Hauser are sufficient to support a finding of probable cause, and (2) the "subfacial" sufficiency of the affidavits and whether there were material misrepresentations and omissions that affected the magistrate's determination of probable cause.

An order authorizing a wiretap, like an ordinary search warrant, must be supported by a magistrate's finding of probable cause. 18 U.S.C. § 2518(3)(a); *United States v. Weinrich*, 586 F.2d 481, 487 (5th Cir. 1978), *cert. denied*, 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979); *United States v. Hyde*, 574 F.2d 856, 862 (5th Cir. 1978). In general, probable cause exists where "the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. New York*, 388 U.S. 41, 55, 87 S.Ct. 1873, 1881, 18 L.Ed.2d 1040 (1967). The Supreme Court has recognized that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause," and that magistrates may use their common sense in determining the existence of probable cause. *Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 590-91, 21 L.Ed.2d 637 (1969). *See also United States v. Davis*, 617 F.2d 677, 659 (5th Cir. 1979). A magistrate's determination of probable cause should be paid great deference by reviewing courts, as long as the magistrate has performed his independent function and not served merely as a rubber stamp for the police. *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512, 12 L.Ed.2d 723 (1964); *See Spinelli v. United States, supra*, 393 U.S. at 419, 89 S.Ct. at 591;

United States v. Davis, supra, 617 F.2d at 692. When the magistrate's finding of probable cause is based on his review of the entire picture presented to him and the use of his own judgment and common sense, his determination is conclusive in the absence of arbitrariness. *United States v. Weinrich, supra*, 586 F.2d at 487; *United States v. Hyde, supra*, 574 F.2d at 862.

The defendants' arguments in these motions to suppress raise what the Fifth Circuit has described as challenges to both the "facial sufficiency" of the affidavits. *See United States v. Martin*, 615 F.2d 318 (5th Cir. 1980). An attack on the facial sufficiency of the affidavit involves the information contained within the four corners of the affidavit itself. A challenge to the subfacial validity of the affidavit goes beyond the document and concerns itself with alleged misrepresentations and omissions that could have affected the magistrate's assessment of probable cause.

In this case, defendants challenge the facial sufficiency of the affidavits by arguing that the hearsay and double hearsay information provided to the affiant by Hauser and the information gleaned from the consensually recorded taped communications were insufficient to support a finding of probable cause. Where the information contained in an affidavit supporting a wiretap order is obtained from an informer such as Hauser, the magistrate's determination of probable cause must be measured against the dual test established by *Aguilar v. Texas, supra*, and *Spinelli v. United States, supra*. First, the affidavit must provide the magistrate with the underlying facts from which the informant concluded that criminal activity was occurring or had taken place, and these facts must warrant an inference of criminal activity. Second, the affidavit must provide facts establishing the probable credibility of the informer or the

reliability of his information. Both requirements must be satisfied; if either is not met, the affidavit cannot establish probable cause. *United States v. Martin, supar,* 615 F.2d at 324. I conclude in this case that both elements of the *Aguilar-Spinelli* test are satisfied on the face of the affidavits.

The background portion of the affidavit sets out sufficient facts as related by the informer, Hauser, taken as a whole and read in context with the entire affidavit to warrant an inference that criminal activity related to the acquisition of insurance contracts through corrupt influence and bribery had occurred in 1976. Similarly, the affidavit contains sufficient facts provided by the consensually-made tape recordings to warrant an inference that influence and payoffs were to be used to obtain public employee insurance contracts in Orleans and Jefferson Parishes in 1979. I conclude from my reading of the affidavits that sufficient facts were stated to satisfy the first element of the *Aguilar-Spinelli* test. Similarly, the detailed affidavits submitted in support of the early wiretap applications also supplied the judges who issued the orders with sufficient facts to determine the probable credibility and reliability of the informer. The information contained in the background portion of the affidavit related to the 1976 transactions is detailed and is based largely on Hauser's personal knowledge, observations, and participation in the activity. Much of the background information concerning Hauser's past dealings with Marcello and Davidson is corroborated by the consensual recordings which are the source of the information contained in the second part of the affidavits. The affidavit informs the magistrate that despite Hauser's past dealings with Marcello and Davidson, he was now cooperating with the FBI by taping conversations in connection with the

investigation, (May 4, 1979 affidavit of Walker, ¶ 15), and that a federal criminal prosecution was pending against Hauser at the time he was becoming involved as an informer in the BRILAB investigation (May a4, 1979) affidavit of Walker, ¶ 52). In short, the information set out in the affidavits provided the magistrates with sufficient evidence to warrant a finding of probable cause, and those findings should not now be disturbed.

Defendants' challenge to the subfacial sufficiency of the affidavits argues that the affidavits are flawed by material misrepresentations and omissions that undermine the affidavits and vitiate the finding of probable cause. These arguments go beyond the four corners of the affidavits to attack the probable cause determinations. The validity of such subfacial challenges to affidavits presented in support of warrants was recognized by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and has also been recognized by the Fifth Circuit. *United States v. Martin, supra*, 615 F.2d at 328; *United States v. Astroff*, 578 F.2d 133 (5th Cir. 1978). In *Franks*, the Court recognized a defendant's right to challenge the truthfulness of statements made by the affiant in an affidavit supporting a warrant and ruled that in some circumstances a pretrial evidentiary hearing on the issue might be required. If at the hearing "the allegation of perjury or reckless disregard [for the truth] is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." 438 U.S. at 156, 98 S.Ct. at 2676. In a summary at the end of its opinion, the Court said:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of *deliberate falsehood or of reckless disregard for the truth*, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. *Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.* Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficcient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

438 U.S. 171-72, 98 S.Ct. 2684-85 (emphasis added). While *Franks* deals only with misrepresentations in the affidavit, the Fifth Circuit has held by analogy to *Franks* that "omissions...made intentionally or with reckless disregard for the accuracy of the affidavit" may also vitiate a finding of probable cause. *United States v. Martin*, *supra*, 615 F.2d at 329.

Using *Franks* as my guide, I determined that defendants had made a sufficient preliminary showing of possible misrepresentations and omissions in the affidavit to warrant an evidentiary hearing. At that hearing, the testimony of FBI Agent Charles Walker, the affiant in the May 4, 1979 application for a wiretap order, and Bruce Kelton, the government attorney who prepared the initial application, was taken. In addition, defendants submitted a substantial amount of documentary evidence. Also admitted into evidence during this hearing were copies of the consensually recorded taped communications of Hauser, Marcello, and Davidson made prior to the May 4 application and accompanying transcripts of the tapes prepared by the government. I have now carefully reviewed the evidence and listened to the tape recordings and I conclude that defendants' motions to suppress on these grounds must be denied. It is true, as defendants have pointed out, that there were some misrepresentations and omissions in the affidavits, but in each instance they were either unintentional or were not made recklessly, or they were immaterial to a finding of probable cause. Most of what the defendans characterize as unlawful misrepresentations are, in fact, reasonable inferences and interpretations which can be drawn from a review of all the tapes and an understanding of the statements in the entire context of the series of conversations among the participants.

It is unnecessary to address each of the arguments and allegations raised by the defendants, but a few examples will illustrate my views. In paragraph 20 of the affidavit, the affiant describes a conversation between Hauser and Marcello in which Hauser allegedly asks Marcello if Marcello has any "juice" with the New Orleans City Council that might assist Hauser in winning an insurance contract for the city's public employees. Ac-

cording to the government's affidavit, Marcello replied: "Yes, I've got 'em all where I want 'em." Defendants contend that Marcello's actual response was: "Yeah, I got them all what I want." I have listened to the tape recording of this particular conversation more than 12 times, and I conclude that it is possible to hear the statement either way and I am not now positive which is correct. In considering the remark in the context of the entire conversation and the series of conversations represented by the tapes that were admitted into evidence, however, I believe that the interpretation placed upon the conversation by the affiant is an accurate one. The inference arising from the conversation that Marcello exercises influence over the decisions of the council is a reasonable one based on a review of the entire conversation that supports the finding of probable cause. Similarly, the defendants challenge the use in paragraph 24 of the affidavit of the phrase "inside information" to describe information Marcello allegedly would provide to Hauser concerning bidding for insurance contracts for Jefferson Parish public employees. The defendants argue that the government affidavit has in fact placed placed a sinister hue on what in reality was an offer to obtain perfectly legitimate information, such as bid specifications for the parish insurance business. While it is true that the phrase "inside information" does not appear on the recording of the conversation upon which this paragraph of the affidavit is based, it is clear to me from my review of the exchange in the context of the entire conversation that the affiant's characterization of the conversation was a reasonable and accurate one.

Perhaps the most serious misrepresentations raised by the defendants concern paragraphs 23 and 28 of the affidavit. In paragraph 23, the affidavit states that while discussing the Jefferson Parish insurance contracts during

an April 2, 1979 conversation, Hauser said that once the contract was obtained, " 'we'll pay who we have to pay' and Marcello verbally agreed." I agree with defendants that the phrase "we'll pay who we have to pay" does not appear on the tape. In fact, Walker admitted as much when he testified during the hearing. I conclude, however, that the placement of quotes around the disputed phrase was not done in reckless disregard of the truth since a review of the entire conversation indicates that paragraph 23 is an accurate conveyance of the meaning of what was said in that conversation. The actual exchange on which this paragraph was based appears to have been Hauser saying that "whatever we have to take care of we'll take care of" and Marcello responding "That's all." It is important, I believe, not to view these brief verbal exchanges in a vacuum; instead, they can only properly be understood and interpreted when heard in the context of the relevant conversation as a whole. While the actual words presented to the magistrate in the affidavit were inaccurate, the magistrate was not misled because the paragraph accurately reflected what the conversation, viewed as a whole, was all about. In paragraph 28, the affidavit describes an April 7, 1979 conversation between Hauser and Davidson. While the affidavit characterizes this paragraph as the summary of a taped conversation reviewed and analyzed by the affiant, it is actually a summary of a telephone call monitored on an extension phone in Hauser's home by another FBI agent. *See* defendants' exhibit 35. Apparently, no recording of this conversation exists, although the magistrate apparently was led to believe that this paragraph was based on a recording. I find, however, that even if this paragraph is stricken from the affidavit, a sufficient basis for a finding of probable cause still exists in the remaining content of the affidavit.

I have reviewed each of the defendants' allegations of misrepresentations or omissions raised in their pre-trial motion papers, in their questioning and oral argument at the evidentiary hearing, and in the supplemental memorandum filed by defendant, Roemer after the hearing. I have measured these allegations against what I have read in the affidavits and heard on the tapes, and I have weighed them against the applicable legal standards provided by the Supreme Court and the Fifth Circuit. I conclude that the defendants have failed to establish intentional or reckless misrepresentations or omissions in the affidavits which, when set to one side of the affidavits, render them insufficient to establish probable cause. Most of the alleged misrepresentations or omissions raised by the defendants are in fact accurate reflections or interpretations of the tape-recorded conversations when those statements or remarks are heard and understood in their proper context within the series of conversations relevant to these motions. Those few allegations that raise actual misrepresentations or omissions are either unintentional, not recklessly made, or have no effect on the sufficiency of the affidavit to support a finding of probable cause when deleted from the affidavit. Defendants' subfacial challenge to the sufficiency of the affidavits has therefore failed, and the motions to suppress on those grounds are denied.

B) *Staleness*

An additional argument raised by the defendants in connection with the sufficiency of the findings of probable cause to wiretap is that the background information provided by Hauser in the first part of the affidavit should be stricken from the affidavit on grounds of staleness. Defendants contend that because the background information concerns events occurring from late 1975 to September

1976, it is stale information which cannot be used to support a finding of probable cause in the 1979 applications for wiretap orders. I disagree with the defendants' argument.

The staleness standard does not establish an arbitrary time limitation in which information must be presented to a magistrate. Instead, it is clear that in some circumstances "information which demonstrates a chain of related events covering a broad span of time continuing to the current period may furnish a most reliable indicia of present activity...." *United States v. Weinrich, supra*, 586 F.2d at 491. Staleness is an issue which must be decided on the peculiar facts of each case, but the rule allows "fairly long periods of time to elapse between information and search warrant in cases where the evidence clearly shows a longstanding, ongoing pattern of criminal activity." *United States v. Hyde, supra*, 574 F.2d at 865.

In this case, the facts set out in the affidavit describe similar kinds of criminal activity occurring in 1976 and again in 1979 among persons who appear to have had a longstanding and ongoing relationship. Moreover, the older information set out in the background portion of the affidavit is corroborated in many respects by the information obtained from the consensual tape recordings made in 1979. Under these circumstances, it was not unreasonable for the judges who issued the intercept orders to conclude that the relationships and activity described in the affidavits was ongoing and continuing, and I will not disturb their findings of probable cause to issue intercept orders on grounds of staleness.

C) *The Statutory Requirements*

At various points in their motions, defendants have

sought to suppress the tape recordings made pursuant to court orders on grounds that the government failed to comply with some of the statutory requisites established by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* Included among defendants' arguments are that (1) the orders are insufficient on their face; (2) the government failed to "minimize the interception of communications not otherwise subject to interception" pursuant to 18 U.S.C. § 2518(5); (3) the orders failed to particularly describe the communications sought to be intercepted pursuant to 28 U.S.C. § 2518(4); (4) the government provided an insufficient justification for the need for electronic surveillance and failed to try other investigatory techniques before resorting to wiretapping as required by 18 U.S.C. § 2518(1)(c); (5) the government failed to comply with the sealing requirements of 18 U.S.C. § 2518(8)(a); and (6) unauthorized disclosures were made to the grand jury in violation of 18 U.S.C. § 2517(5).

I have been provided with no evidence to support any of the defendants' allegations, and my own examination of the orders and the relevant parts of the record in this case convinces me that all requirements of 18 U.S.C. § 2510 *et seq.* have been complied with by the government. Defendants' motions to suppress on these grounds are therefore denied.

D) *Miscellaneous Arguments*

Defendants have also raised several miscellaneous arguments in support of their contentions that the tapes made pursuant to court-ordered wiretaps are inadmissible. These arguments include (1) the statute authorizing the wire interceptions, 18 U.S.C. § 2510 *et. seq.*, is unconstitutional; (2) the application failed to include a statement of

facts relating to previous interceptions of the defendants' communications; (3) unauthorized interceptions of defendants' conversations were made; and (4) the intercept orders are "irretrievably tainted" under the doctrine of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). I conclude that all of these arguments are without merit, and that the motions to suppress the court-ordered wiretaps on these and any other grounds asserted by the defendants are denied without need for further discussion.

VI. *Motion to Disclose Identity of Informer*

Near the end of August, 1980, a sealed envelope was delivered to the office of the attorney-in-charge of the Justice Department's New Orleans Organized Crime Strike Force.[7] The only identification contained on the envelope was a telephone number scrawled on the outside. The attorney-in-charge opened the envelope and found a spiral looseleaf notebook containing telephone call logs and appointment notations. The notebook apparently belonged to defendant Marcello. The attorney turned over the notebook and the telephone number to an FBI agent who after calling the telephone number on the envelope arranged to meet with the person who answered. They met on five occasions in August and early September 1980 and the agent received eleven additional notebooks, all containing information similar to that in the first notebook and all apparently

[7] The factual narrative that comprises the first three paragraphs of this section of my minute entry is based on the testimony of the witnesses who testified at the evidentiary hearing conducted on this motion. The witnesses were Russell Schonekas, counsel for defendant Marcello; Eades Hogue, attorney-in-charge of the Justice Department's New Orleans Organized Crime Strike Force; John Volz, United States Attorney for the Eastern District of Louisiana; and Special Agent Harold Hughes of the New Orleans office of the FBI.

belonging to defendant Marcello. The notebooks contained information about appointments and telephone calls dating from 1970 to 1977, and the government officials reviewed the notebooks and determined that they were irrelevant to the BRILAB prosecution and would not be used at trial.

On October 2, 1980, counsel for defendant Marcello was summoned to the Office of the United States Attorney for this District. When he arrived, he was given the twelve notebooks. Government representatives declined to identify the source of their information since the informer had requested anonymity because of fear of reprisals.

The notebooks were personal property of Marcello which had been stolen in an August 30, 1977 burglary of his business office and reported to the Jefferson Parish Sheriff's Office. The FBI was aware that Marcello had reported a burglary, and when the informer provided the FBI with the twelve notebooks, he was questioned about his knowledge of the burglary. According to the FBI agent who met with the informer, the informer denied that he had committed the burglary and denied that he knew the identity of the burglar.

Defendant Marcello has brought this motion to require the FBI or the government attorneys (1) to disclose the name and address of the informer who provided the government with the notebooks allegedly taken in the burglary, and (2) to state (a) whether they know the identity of the burglar, (b) whether the government participated in or was responsible in any way for the burglary, and (c) whether they have reviewed or examined the notebooks and plan to use them at the trial of this case. Counsel for the defendant agreed at oral argument on this motion that the government had satisfied the second part of this

motion. Each of the government officials who testified at the evidentiary hearing on this motion denied that the government perpetrated the burglary or was in any way involved, and also denied that any government official knows the identity of the burglar. some of the government officials admitted they had examined the notebooks, but the Strike Force attorney-in-charge testified that they were irrelevant to the BRILAB case and would not be used at trial. Thus, the only portion of defendant's motion that remains to be decided is defendant's request for disclosure of the identity of the informer who provided the government with the notebooks. Defendant's legal theory in support of his motion is rather vague; his very brief memo in support of the motion states simply that he "relies upon the 5th and 14th Amendments to the U.S. Constitution and Rule 47 of the Federal Rules of Criminal Procedure." Counsel's oral argument following the evidentiary hearing seemed to touch on notions of fundamental fairness inherent in the Fifth Amendment. Defendant cites no case law in support of his motion.

Although the government is required to disclose the identity of confidential informers under some circumstances, there is no general requirement that an informer's identity be disclosed in all cases. *See Rugendorf v. United States*, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964); *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). In *Roviaro*, the Supreme Court provided the following general guidance on the "informer's privilege:"

> **What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law**

to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The scope of the privilege is limited by its underlying purpose....

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. *Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.* In these situations the trial court may require disclosure....

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

353 U.S. at 59-62, 77 S.Ct. 627-29 (citations omitted) [emphasis added]. In general, therefore, disclosure of an informer's identity will be ordered when the informer's identity is relevant, helpful to the defense, or essential to a fair

determination of the case.

In this case, disclosure of the informer's identity will serve none of these purposes. Defendant has failed to demonstrate the relevance of this informer's identity to this case and his defense, and I discern none. The identity of the informer, who provided information which itself is irrelevant to this case, is in no way essential to determination of this proceeding, nor would it be helpful to the defense of these charges. The informer apparently fears revelation of his or her identity and obviously would not have come forward except under the cloak of anonymity explained in *Roviaro*. Under these circumstances, the balance of interests weighs in favor of continued confidentiality, and I therefore deny defendant's motion for disclosure.

ORDER

SEAR, District Judge.

IT IS ORDERED that defendants' motions to adopt the substantive motions and motions to suppress of their co-defendants are GRANTED.

IT IS FURTHER ORDERED that the defendants' motions to dismiss the indictment in the captioned proceeding on grounds of governmental misconduct and overreaching, artificially created jurisdiction, and selective prosecution are DEFERRED until trial. Defendants' motion to dismiss the indictment on grounds of prejudicial publicity is DENIED, but defendants' alternative motion for sanctions is DEFERRED.

IT IS FURTHER ORDERED that all other substantive motions urged by defendants in arguments conducted

October 6 and 7, 1980, including the motions to sever, to dismiss, and to strike portions of the indictment, are DENIED.

IT IS FURTHER ORDERED that the defendants' motions to suppress the consensually recorded tapes of defendants' conversations and the tape recordings made pursuant to court orders, which motions were urged and argued December 8 through 12, 1980, are DENIED. The motion of defendant Marcello for disclosure of the identity of a government informer is also DENIED.

APPENDIX "C"

UNITED STATES of America

v.

Carlos MARCELLO et al.

Crim. A. No. 80-274.

United States District Court,
E.D. Louisiana.

April 20, 1982.

Defendants moved for judgment of acquittal or, in the alternative, for new trial following their convictions of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act. The District Court, Sear, J., held that: (1) the Government's involvement in the sting operation was not so unusually pervasive as to violate due process principles and did not result in the artificial creation of federal jurisdiction; (2) there was sufficient evidence that defendants agreed to commit one or more additional predicate offenses to sustain their convictions; (3) although the offenses which served as additional predicate offenses were related to the initial predicate offense they were separate offenses for purpose of establishing a pattern of racketeering activities; and (4) the Government amply proved an agreement to participate in an enterprise separate and apart from the mere agreement to commit acts of racketeering activity.

Motions denied.

John Volz, U. S. Atty., L. Eades Hogue, U. S. Justice

Dept., Albert Winters, Richard T. Simmons, Asst. U. S. Attys., John Voorhees, U. S. Justice Dept., New Orleans, La., for Government.

Arthus A. Lemann, III, Provino Mosca, Russell Schonekas, New Orleans, La., Henry Gonzalez, Tampa, Fla., for defendant Carlos Marcello.

John R. Martzell, John Wilson Reed, Michael Fawer, Mathew Greenbaum, New Orleans, La., for defendant Charles E. Roemer, II.

SEAR, District Judge.

Introduction

Following their convictions in this federal criminal prosecution, defendants Carlos Marcello and Charles E. Roemer, II, moved for judgments of acquittal or, in the alternative, for a new trial on a number of grounds. After considering the extensive memoranda submitted by counsel and the oral argument presented at the hearing of December 14, 1981, in light of the substantial record of the case and the voluminous evidence adduced at trial, I denied the defendants' motions, ruling orally from the bench. At the same time, I also denied four motions which had been argued by the defendants prior to trial, but whose determination had been deferred until trial. *See United States v. Marcello*, 508 F.Supp. 586, 590-98 (E.D.La.1981).

Background of the Case

In the summer of 1980, Marcello and Roemer were charged with three co-defendants in a lengthy twelve-count indictment resulting from a year-long Justice Department

undercover "sting" operation commonly known as Brilab.[1] The Brilab investigation was nationwide and broad in scope, centering upon suspected illegal activities involving public officials, labor unions and reputed organized crime figures. The investigation was carried out by agents of the Federal Bureau of Investigation working with a convicted felon and career con man named Joseph Hauser. Hauser had recently pleaded guilty to federal criminal charges arising from a scheme to swindle health, welfare and pension funds from labor unions, *United States v. Hauser*, No. CR-78-313 (D.Ariz. Feb. 5, 1979). He willingly agreed to cooperate with federal officials when approached at about the time of his quilty plea by FBI agents who proposed that he participate in the undercover operation.[2] Hauser's agreement to cooperate in the investigation was not entirely motivated by the spirit of penitence or by a sense of civic obligation. In exchange for his participation in the Brilab investigation, Hauser received the assistance of Justice Department attorneys who appeared on his behalf in his Arizona sentencing, substantial compensation payments in addition to reimbursement for expenses and other fringe benefits during his participation in the Brilab investigation, and a place in the federal witness protection program when his term of imprisonment resulting from his criminal conviction ended.

The Louisiana arm of the Brilab operation in which

[1] The term "Brilab" is an acronym which stands for "bribery-labor." Ironically, the Louisiana component of the Brilab investigation in no way implicated labor unions or their officials in any alleged or actual wrongdoing uncovered by the investigation.

[2] Hauser testified at trial that he was initially approached about cooperating in the investigation by FBI agents William Wiechert and William Fleming. *See* Trial Testimony of Joseph Hauser under Direct Examination by the Government, June 15, 1981, Trial Transcript at 4208-12.

Hauser became involved lasted about one year, from February 1979 to February 1980, a period during which the 1979 gubernatorial campaign and election were conducted. As part of the undercover investigation, Hauser and two FBI agents, Michael Wachs and Larry Montague, posed as representatives of a fictitious Beverly Hills, California firm called Fidelity Financial Consultants. Wachs, who assumed the alias Michael Sachs, and Montague, who took the name Larry Golden, working together with Hauser, set up their dummy business on the West Coast. Personalized business cards and stationery showing that they represented Prudential Insurance Company of America, one of the largest insurance firms in the world, were printed by the FBI.[3] Posing as insurance representatives with a connection to Prudential, Hauser and the two agents contacted individuals with whom Hauser said he had dealt in the past, including Carlos Marcello, in an effort to gain a foothold for obtaining insurance contracts with state and local governmental agencies and private businesses in Louisiana. The agents' activities included face-to-face meetings with Marcello, several candidates for public office, and Roemer, who was then Commissioner of Administration of the state of Louisiana and chief of the gubernatorial campaign of then-State Senator Edgar G.

[3] Government exhibit No. 309. John Stoddart, senior vice president and general counsel of Prudential, testified that although Prudential had agreed to cooperate with the government in the Brilab investigation, the printing of business cards bearing the inscription "Fidelity Financial Consultants Representing Prudential Insurance Company of America" and listing an agent's alias, address and telephone number was in conflict with assurancces Prudential had received from the FBI in May 1979 that there would be no "advertising" of a connection between Prudential and Fidelity. *See* trial testimony of John Stoddart under direct examination by defendant Marinello, July 23, 1981, Trial Transcript at 9097-9119. Interestingly, the name Prudential Insurance Company was printed on the business cards in boldface type at least twice as large as the lightface printing used for the name Fidelity Financial Consultants.

"Sonny" Mouton of Lafayette. Scores of tape recordings of conversations concerning the election campaign, insurance, and the activities of the agents and the defendants were made with Hauser's consent[4] or pursuant to wiretap orders previously issued by United States district judges.[5] More than 130 of the surreptitiously made recordings were eventually used as evidence at the Brilab trial. The agents made cash payments of thousands of dollars to several candidates or their representatives. Roemer himself received two payments totalling $25,000, which he contended were campaign contributions for Mouton. In the indictment that formed the basis for this criminal prosecution, however, the payments were characterized as bribes given in return for Roemer's promise to use his influence to shift the state employees insurance contract from its existing carrier to the agents.

Count One of the superseding indictment[6] that resulted from the Brilab investigation charged Marcello, Roemer, I. Irving Davidson, Vincent Marinello, and Aubrey Young with a conspiracy in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1962(d). Specifically, the defendants were charged with conspiring to associate together in fact as an enterprise for the purpose of obtaining the state employees insurance contract through the commission of various criminal acts, including public bribery in violation of

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[4] *See* 18 U.S.C. § 2511(2)(c) and (d); *United States v. Marcello*, 508 F.Supp. 586, 598-601 (E.D.La.1981).

[5] *See* 18 U.S.C. § 2510 *et seq.*

[6] Two indictments were actually returned. Each contained essentially the same charges, but the first, returned on June 17, 1980, Court Record Document No. 1, named only four defendants while the second, a superseding indictment returned on August 12, 1980, Court Record Document No. 56, named a fifth defendant, Aubrey W. Young.

Louisiana law, La.Rev.Stat.Ann. § 14:118 (West Supp.1980); interstate travel with intent to conduct unlawful activity in violation of 18 U.S.C. § 1952; wire fraud in violation of 18 U.S.C. § 1343; and mail fraud in violation of 18 U.S.C. § 1341. Count Two charged all five defendants with a substantive violation of RICO. Counts Three through Twelve alleged various acts of mail fraud, wire fraud, and interstate travel in aid of unlawful activity against some or all of the defendants.

After eighteen weeks of trial, the jury found Marcello and Roemer guilty of Count One, the RICO conspiracy. Marcello was acquitted on the eleven other counts against him, and Roemer was acquitted of the five other charges against him.[7] Their co-defendants were acquitted on all charges against them.[8]

Prior to the trial, I had deferred ruling on three motions brought by the defendants to dismiss the indictment on grounds of governmental overreaching or misconduct, selective prosecution, and artificially created federal jurisdiction,[9] an issue raised with renewed fervor in

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[7] Roemer was acquitted of Counts Nine and Eleven, both involving wire fraud charges, when I granted his motion for entry of judgment of acquittal as to those counts pursuant to Rule 29(a), Fed.R.Crim.Pro., on July 7, 1981 at the close of the government's case-in-chief. The jury acquitted him of Counts Two, Ten and Twelve. The jury acquitted Marcello on Counts Two through Twelve.

[8] Davidson was acquitted of all twelve counts against him by the jury. Marinello was acquitted of Count eleven on July 7, 1981 when I granted his motion for entry of judgment of acquittal as to that count pursuant to Rule 29(a), Fed.R.Crim.Pro. The jury acquitted him of Counts One, Two and Twelve. Young was acquitted of all counts alleged against him in the indictment when I granted his motion for entry of judgment of acquittal pursuant to Rule 29(a) on July 7, 1981.

[9] In their pre-trial motions, the defendants had also sought

defendant Roemer's post-trial motion for judgment of acquittal. The rulings were deferred primarily so that my determination would be based on a complete evidentiary record and a complete understanding of the facts of this complex case without the necessity of conducting extensive and redundant pre-trial hearings that would have duplicated much of the evidence to be presented at the anticipated lengthy trial. *United States v. Marcello, supra*, 508 F.Supp. at 594. Although the defendants were provided an opportunity at the post-trial hearing conducted on December 14, 1981 to present any further evidence relevant to their pre-trial motions,[10] no additional evidence was presented at that time and the defendants rested their motions on the substantial record developed at trial. After the trial, the convicted defendants filed lengthy post-trial motions[11] which were scheduled for hearing and argument on December 14, 1981 along with the deferred motions. In addition to the previously raised issue of artificially created federal jurisdiction, the post-trial motions included the following three general arguments: (1) The evidence presented during the trial was insufficient to support the RICO conspiracy conviction because no actual agreement to commit the requisite second predicate offense was proved; (2) The jury instructions concerning certain elements

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(Footnote 9 continued)
dismissal of the indictment on grounds that they were prejudiced by government-initiated leaks to the news media prior to and during the grand jury investigation that led to their indictment. I denied their motion to dismiss, but deferred ruling on their alternative motion for sanctions against the government. *See United States v. Marcello*, 508 F.Supp. 586, 598 (E.D.La.1981). My ruling on the defendants' alternative motion for sanctions is discussed at pages 1378-79.

[10] *See* Court Record Document No. 463, at 4-5.

[11] *See* Court Record Documents No. 448, 548, 549, 557. Counsel for defendant Marcello also indicated his desire to adopt the arguments set forth in defendant Roemer's motion and memoranda.

of the RICO conspiracy conviction were insufficient; and (3) The government failed to prove either the existence of an "enterprise" separate from the alleged predicate offenses or a "pattern of racketeering activity" as that term is defined by the RICO statute.

Governmental Overreaching and Artificially Created Federal Jurisdiction

The defendants' allegations of governmental misconduct or overreaching and artificially created federal jurisdiction share common legal and factual bases and require substantially similar proof. Both claims touch upon the conduct of government agents in the instigation, operation and maintenance of alleged criminal offenses during the Brilab investigation. Both require examination of the specific activities of these government agents in an undercover operation, which, by its nature, required a degree of government participation, and both seek to define the boundary between permissible and impermissible governmental involvement.

In their motions to dismiss on grounds of governmental misconduct and overreaching, the defendants contend that the government's involvement in the Brilab scheme was so pervasive and outrageous that due process principles or the court's supervisory power over the criminal justice system require that the indictment against them, and their resulting convictions based on that indictment, be dismissed. Although the Supreme Court has never applied the defense of outrageous governmental misconduct in a specific case to dismiss an indictment or vacate a conviction, it has recognized that a situation may arise "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely

bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973). In order for the defense to be invoked successfully, the egregious conduct of the law enforcement agents must be violative of our concepts of fundamental fairness and the universal sense of justice embodied in the due process clause. *Id.* In a concurring opinion in *Hampton v. United States*, 425 U.S. 484, 495 n.7, 96 S.Ct. 1646, 1653 n.7, 48 L.Ed.2d 113 (1976), Justice Powell stated that in order for the defense to be invoked successfully in any given case, "police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction."

Several courts of appeals have established that in some circumstances convictions obtained through egregious governmental misconduct in the creation and maintenance of criminal activities must be vacated. *See United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). Other courts, while recognizing the validity of the defense, have noted that it is one that "would rarely, if ever, be available." *United States v. Brown*, 635 F.2d 1207, 1212 (6th Cir. 1980), *quoting United States v. Leja*, 563 F.2d 244, 246 n.4 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074, 98 S.Ct. 1263, 55 L.Ed.2d 780 (1978). The Fifth Circuit has acknowledged that a defense of governmental misconduct grounded on concepts of due process and existing separately from the traditional defense of entrapment is available in some circumstances, *United States v. Meacham*, 626 F.2d 503, 512 (5th Cir. 1980); *United States v. Graves*, 556 F.2d 1319, 1324 (5th Cir. 1977), *cert. denied*, 435 U.S. 923, 98 S.Ct. 1485, 55 L.Ed.2d 516 (1978), but in no case has the Fifth Circuit yet reversed a conviction on that specific ground.

The defendants' motions to dismiss on grounds of artificially created federal jurisdiction have two basic components, one asserted pre-trial in very general terms, and the other argued post-trial and addressed to specifics. In their motions raised prior to trial, the defendants contended that the overinvolvement of government agents in the scheme resulted in the creation and maintenance of the interstate commerce elements of the offenses charged in the indictment. For example, the defendants argued pre-trial that because the California firm set up by the FBI was a purely fictitious operation through which insurance contracts could never have been written, there could be no effect on interstate commerce in reality through the dealings of the defendants with the agents. In their post-trial motions, the defendants have refined their argument, concentrating on specific evidence adduced at trial which they contend demonstrates the government's creation of the federal jurisdictional elements of the mail and wire fraud offenses that serve as predicate acts to the RICO conspiracy of which they were convicted. The defendants argue that the government agents themselves created and caused the November 2, 1979 mailing which forms the basis of the mail fraud predicate offense and that the government manipulated the cross-country travels of government informer Joseph Hauser and the undercover agents in such a way as to create the necessity for interstate telephone calls the defendants caused or made to Hauser or to the agents in furtherance of the scheme.

While the Fifth Circuit has never vacated a conviction on grounds of artificially created federal jurisdiction, it has recognized the legitimacy of the defense. *United States v. Perrin*, 580 F.2d 730, 737 (5th Cir. 1978), *aff'd*, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). The defendants, however, have relied principally on the decision of

the Second Circuit in *United States v. Archer, supra.*[12] In *Archer,* federal and local law enforcement officers created an undercover operation to investigate suspected corruption and public bribery in the New York City criminal justice system. Two convictions under the Federal Travel Act, 18 U.S.C. § 1952, resulted, but the Second Circuit vacated those convictions finding "manufactured federal jurisdiction" in a situation in which "the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present." *United States v. Archer, supra,* 486 F.2d at 682.

Federal jurisdiction in the *Archer* case was based primarily on three interstate or foreign telephone calls allegedly made or received by the defendants in furtherance of the bribery scheme. The first call involved a defendant in New York who returned a telephone call made by a government agent in New Jersey. The court discarded this call as a legitimate basis for finding federal jurisdiction because the agent admitted he had gone to New Jersey for the sole purpose of getting the defendant to talk in an interstate phone conversation. *Id.* at 674, 681-82. The second call involved attempts by a defendant in New York to reach a government agent at a Las Vegas, Nevada hotel. The court rejected these unsuccessful attempts to reach the agent in Las Vegas because the calls "resulted from a plant of misinformation" which provoked calls that the defend-

[12] The defendants have also placed some reliance on the opinion of the district court in *United States v. Jannotti,* 501 F.Supp. 1182 (E.D.Pa.1980), *see* Court Record Document No. 548 at 44-45, in which the district judge vacated two convictions obtained as a result of the Abscam investigation, another Justice Department "sting operation conducted at about the same time as the Brilab investigation. The ddistrict court's decision has now been reversed, however, by the United States Court of Appeals for the Third Circuit, 673 F.2d 578 (3d Cir. 1982).

ant would not otherwise have made and because the agent knew that any attempt by defendant to reach him at the hotel would be fruitless because the agent would not be at the hotel and "there was not and, under the circumstances, could not have been any actual use of a facility in interstate commerce which would in fact promote, etc., any unlawful activity." *Id.* at 682. The third call was from a government agent, who was in Paris, France on a legitimate, though unrelated, investigation, to a defendant in New York. Although the government agent had not been sent abroad for the sole purpose of making a foreign call that would serve to create federal criminal jurisdiction, the court rejected it because the call was a casual and incidental occurrence which served no real purpose in furtherance of the scheme and had in no way been initiated by the defendant. *Id.* at 682-83. On rehearing, the *Archer* court adhered to its decision reversing the convictions and dismissing the indictment, but limited somewhat the broad language it had used in rendering its initial opinion by noting that it had gone "no further than to hold that when the federal element in a prosecution under the Travel Act is furnished *solely by undercover agents*, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves...." (emphasis added). *Id.* at 685-86.

The use of paid informants and undercover operatives, like those employed in Brilab, is, of course, a legitimate and permissible law enforcement technique and means of investigation. *See United States v. Russell, supra*, 411 U.S. at 432, 93 S.Ct. at 1643. Only when the specific acts of such government agents[13] reach "a demonstrable

[13] The activities of hauser, a paid government informer, are considered those of a "government agent" for purposes of the defenses of governmental overreaching or outrageous misconduct and artificially

level of outrageousness," *Hampton v. United States*, *supra*, 425 U.S. at 495 n.7, 96 S.Ct. at 1653 n.7, or result in manufactured jurisdiction should convictions obtained as a result of such investigative techniques be vacated. The government's involvement in the Brilab scheme was undeniably extensive. When that involvement is viewed as a whole, however, I find that it was not so unusually pervasive as to violate those notions of justice and fair play embodied in our concept of due process and necessary for the proper administration of our criminal justice system. Moreover, federal jurisdiction was not created solely and impermissibly by the activities of government agents in the manner prohibited by the *Archer* case.

Even those isolated government actions during Brilab that, in my view, come closest to being included in the category of activities prohibited by the cases discussed above were insufficient to require setting aside these convictions. For example, on at least two occasions, Hauser's voice could be heard during tape-recorded conversations in which, the defendants contend, Hauser was attempting to implicate others in criminal activity even though the general conversations themselves were innocent.[14] On June 28, 1979, Hauser stepped into a restroom alone during a meeting with Marcello and Davidson at Marcello's Metairie, Louisiana office. The meeting occurred very early in the Brilab investigation before the details of the RICO

(Footnote 13 continued)
created federal jurisdiction. *See United States v. Brown*, 635 F.2d 1207 (6th Cir. 1980); *see also Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) (activities of government informer considered those of government agent for entrapment purposes).

[14] Hauser's extemporaneous remarks on these occasions and others were referred to as the "Hauser soliloquies" by counsel during the trial.

conspiracy of which Marcello and Roemer were convicted had begun to emerge. While still alone, Hauser said:

> Carlos, I'm listening. And I'm reading the papers. I understand what you're saying. Okay. I'm gonna read what you're showing me. So in a sense what you're saying is that you're taking over the whole family. Oh, then we can write business throughout the country. I'm, I'm reading. Okay, I'll read it. Lemme finish reading this. You mean to tell me something like this they distribute in the mail? Oh, I see. By messenger. (long pause) (time reduced) I never realized numbers were such a big game.[15]

On November 11, 1979 during a meeting between Hauser and gubernatorial candidate Louis Lambert, who was then a member of the Louisiana Public Service Commission, Lambert had clearly left Hauser alone while Lambert left the room to gather some testimonial tickets he planned to sell in exchange for $10,000 in cash that Hauser was prepared to deliver to him. While they were together in the room, the conversation proceeded in part as follows:

> Lambert: What do you want to contribute to my campaign?
>
> Hauser: I want to give you ten thousand dollars cash right now.
>
> Lambert: And I'm gonna give you, let me tell you what I'm doing so you can just (unintel-

[15] Government exhibit 23-T, government transcript at 26; tape played in court during testimony of William Fleming under cross-examination by defendant Marinello, May 12, 1981, and during testimony of Joseph Hauser under cross-examination by defendant Roemer, June 19, 1981.

ligible) .... Wait, right...til I go get some tickets.

Hauser: Oh, leave me alone, give them to L. G. Moore, leave me alone.

Lambert: You take the goddamn tickets and then we've done it the right way.

Hauser: Okay.

Lambert: That scares you, but you just have to learn we've go a new policy.[16]

At this point in the conversation, the sound of footsteps—Lambert's footsteps leaving the room—and the sound of a door opening and closing are clearly audible on the tape recording. Hauser, now momentarily alone in the room, takes the opportunity to inject a word that had not previously been used in the discussion:

Hauser: I want it understood one thing. That's part of the business. I, I call it a *kickback*, you can call it anything you want.[17]

At that point, the sound of a door opening and closing and the sound of footsteps—Lambert's footsteps re-entering the room—are clearly audible on the tape, and Hauser, his solo remarks interrupted in mid-sentence by Lambert's return, concludes:

You want to call it this...you just get

[16] Defense exhibit, denominated "defense tape" in government exhibit transcript book, at 60; tape played in court during testimony of Joseph Hauser under cross-examination by defendant Roemer, June 19, 1981.

[17] *Id.* (emphasis added).

this...okay.[18]

Although Hauser denied on the stand that he was fabricating evidence or that Lambert was out of his presence when he made these statements,[19] it is obvious from listening to the tapes that Hauser was in fact alone.

While Hauser's conduct in these two instances was disreputable and cannot be condoned, it clearly bore no relationship to the offense for which the defendants Marcello and Roemer were convicted. The strength of the connection, or causal relationship, between the challenged government conduct and the commission of the acts for which the defendants stand convicted is a consideration which several courts have deemed important in evaluating a defense of egregious governmental misconduct. *United States v. Brown, supra*, 635 F.2d 1207, 1213; *United States v. Spivey*, 508 F.2d 146, 149-150 (10th Cir.), *cert. denied*, 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975); *United States v. Szycher*, 585 F.2d 443, 447-49 (10th Cir. 1978). Moreover, Hauser's soliloquies are not symptomatic of a broader pattern of governmental misconduct in the Brilab investigation. Instead, they were isolated events of the general type against which Hauser had been warned by federal law enforcement officers working with him in the investigation.[20]

The defendants also contended that the government's overinvolvement in the Brilab scheme is illustrated

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[18] *Id.*

[19] Trial testimony of Joseph Hauser under cross-examination by defendant Roemer, June 19, 1981, Trial Transcript at 4769-77.

[20] *See* trial testimony of William Fleming under direct examination by the government, May 7, 1981, Trial Transcript at 31-32.

by the allegedly substantial role played by Justice Department officials and investigating agents in planning both the general contours and the specific details of Brilab. Hauser and FBI agents Wachs and Fleming were all questioned about whether they attended meetings with, or received instructions from, Justice Department officials about how, why, and against whom the Brilab investigation should be conducted. Yet, I find no convincing evidence to support defendants' contentions concerning the existence of a government masterplan that comprises outrageous overreaching or misconduct in this case. In questioning Fleming, for example, counsel for defendant Roemer made reference to an internal FBI memorandum dated March 22, 1979 originating from the Los Angeles field office of the FBI and addressed to the FBI director.[21] The memorandum requested permission to institute a widespread undercover operation, Brilab, "to criminally involve" labor officials whom Hauser alleged had been involved in bribery in the past. No extensive questioning regarding the memorandum took place and it was not offered in evidence. Although the memorandum used the facially suspicious phrase "to criminally involve," Fleming and the other government agents who testified denied that instigation of criminal activities was the motivation behind the Brilab investigation or that they had received detailed instructions from Washington on how to proceed, and I find that their actions during the more than year-long investigation support this view. Moreover, examination of the memorandum as a whole[22] read in context indicates

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[21] Trial testimony of William Fleming under cross-examination by defendant Roemer, May 11, 1981, Trial Transcript at 433-40.

[22] The memorandum was part of a voluminous collection of documents produced by the government for my *in camera* inspection pursuant to a broad request by the defendants for access to exculpatory material which they might be entitled to receive pursuant to *Brady* v.

that the investigation at that early stage merely contemplated having Hauser recontact individuals with whom he said he had illicit dealings in the past so that the FBI could legitimately investigate those dealings through the medium of Hauser's renewal of past relationships. The fact that the agents eventually became in volved in an investigation of corrupt practices in the obtaining of state insurance contracts relating to the Louisiana gubernatorial campaign and the Office of the Commissioner of Administration, a direction and development clearly unanticipated when the Brilab investigation was germinating in early 1979, further illustrates that it was the defendants themselves, and not the government, who were the architects of the specifics of the offense for which they were eventually convicted.

The events surrounding the mailing of November 2, 1979 and the various interstate telephone calls made or caused by the defendants in furtherance of the scheme, particularly the call from Marcello to Hauser of September 21, 1979, are relevant to the issues of both outrageous governmental misconduct and artificially created federal jurisdiction.

On September 21, 1979, Marcello made a long distance telephone call from Metairie, Louisiana, to Hauser at a motel in Albuquerque, New Mexico. Earlier that day, Marcello and Roemer had met at the St. Ann Hotel in New

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(Footnote 22 continued)
Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. After examining the memorandum, I ordered it produced to the defendants solely because of the use of the phrase "to criminally involve" and because of the possibility that the phrase might somehow prove exculpatory in light of some additional evidence the defendants might produce. No such evidence was in fact produced at trial or during the other hearings conducted in this matter.

Orleans where, according to Roemer's testimony,[23] Roemer agreed to meet with Hauser and the agents. The sole purpose of the call was for Marcello to arrange that meeting:

> Marcello: Okay, I just come from seein' that man (Roemer).
>
> Hauser: Uh huh.
>
> Marcello: Now he said them boys (the agents) are supposed to take out some deals, ya know? Come up with somethin'.
>
> Hauser: Uh huh.
>
> Marcello: Uh, that he could see what he can do, ya know?
>
> Hauser: Uh huh.
>
> * * * * * *
>
> Marcello: Yeah, but he got to show, you got to show uh wat reason and all, I mean uh the boys *gotta come on down*. They got his number haven't they?
>
> Hauser: Who?
>
> Marcello: Your boys.
>
> Hauser: Yeah, what ya mean his number, yeah.
>
> Marcello: His telephone number.
>
> Hauser: Yeah.

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[23] Trial testimony of Charles Roemer under direct examination, July 21, 1981, Trial Transcript at 8615-18.

Marcello: So I can tell ya where, where we go, *you're gonna meet.*

Hauser: Okay.

Marcello: Ya understand? *Ya gotta meet Monday in Shreveport.*

Hauser: We gotta meet him Monday in Shreveport?

Marcello: Yeah.

* * * * * *

Marcello: You come in Sunday. We'll talk Sunday night uh Monday morning.

Hauser: Okay.

Marcello: I'm gonna make ya reservations for Sunday for Monday evenin'. They get, go to Shreveport and I'll have your reservation there and all.[24]

Unlike the *Archer* situation, there is no evidence that the government arranged to have Hauser in New Mexico or prodded Marcello into making this call only as a means of providing federal jurisdiction. Brilab was a broad-based investigation in which Hauser traveled nationwide contacting individuals, including Marcello, with whom he had prior dealings. Both defendants knew at the time Roemer agreed to meet with Hauser and the agents and Marcello acted to schedule that meeting that Hauser's consulting operation was headquartered in California and that he would be traveling west at about the time any meeting

[24] Government exhibit 71-T, government transcript at 1-3 (emphasis added)

would have to be arranged. Moreover, the call was an important one in furtherance of the scheme, not merely casually or incidentally related to obtaining the insurance contract, because it set up an important meeting between Roemer and the agents at which proposals for obtaining the contracts were to be discussed.

Similarly, the November 2, 1979 mailing of a written proposal concerning the insurance contract from the agents to Roemer was an event encouraged, and to some extent expected and approved, by the defendants. Throughout the course of their dealings with the agents, Marcello and Roemer had requested a written proposal from Hauser and the agents for Roemer's use in transferring the state insurance contract from its existing carrier to the agents. On November 1, 1979, Hauser and the agents brought a draft of the proposal to Marcello's office in Metairie. Because the proposal contained a typographical error, however, Hauser asked Marcello if Marcello's secretary would retype the letter for him. Apparently satisfied because Hauser had finally produced the written proposal he and Roemer had so often requested,[25] Marcello was pleased to oblige:

Hauser: Carlos, you know what I need?

Marcello: What?

Hauser: Can Loretta do me a big favor? I need a letter retyped.

Marcello: The girl's gone (unintelligible).

Hauser: Oh, she's gone already?

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[25] *See, e.g.*, portions of transcripts of tape-recorded conversations quoted in text at notes 31-35 *infra*.

Marcello: Michael, was it a big, ah—

Hauser: Can she do it tomorrow?

Wachs: Yeah.

Marcello: You want it in the morning or you need it now?

Hauser: No, I don't need it now. (unintelligible)

Marcello: What you want (unintelligible).

* * * * * *

Hauser: This is a letter with proposals that we're sending to Roemer, and the word more was spelled with two r's and I didn't want to send it out this way, it looks like shit. You understand what I'm saying?

Marcello: Yeah, where's it at?

Hauser: Right there, nothing more, it's got two r's in it.

* * * * * *

Marcello: You don't need it 'til tomorrow?

Hauser: Oh, tomorrow's fine. I'll. I'll leave it with you. I'm leaving it with you anyway, man.

Marcello: Good.[26]

On the following day, again at Marcello's Metairie office, Hauser instructed Janice Decker, Marcello's secretary, on

[26] Government exhibit 106-T, government transcript at 2-3.

how the letter should be retyped.[27] The proposal[28] was mailed after it had been retyped and Marcello had reviewed it approvingly:

> Hauser: Carlos, just look at this. (Chair squeak). This is the letter, read, uh, the important part is the last—the second page.
>
> Marcello: This your brief—you're sending this to Roemer.
>
> Hauser: Yes.
>
> Marcello: On the second page? (Pause—Paper Shuffle) Save 'em a million dollars, man. That's beautiful.
>
> Hauser: Black and white. I'm quotin' them the number.
>
> Marcello: Ya see that's what, that's what I'm sayin', ya see. You got something and ya think, maybe that Roemer should get this letter first, before I talk to him. Tell him ya got a letter, man, coming there. Or we gotta go to Baton Rouge. I don't know you gotta decide. Man, that's your line of business. It ain't me, ya know, Think it over. We got plenty of time but uh, we got to work fast.[29]

The actual mailing was arranged by Marcello's secretary and the agents in the following manner:

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[27] *See, e.g.*, Government exhibit 109-T, government transcript at 5-6.

[28] Government exhibit 313.

[29] Government exhibit 109-T, government transcript at 10-11.

Decker: You want me to have him (Wachs) sign it?

Hauser: Let me have, let him sign it. Address the envelope and then ...

Decker: And I'll ...

Hauser: Then uh.

Decker: You want me to mail it to you?

Hauser: Would you mail it? I'd appreciate it very much.

Wachs: Sign it.

Decker: Yeah.

Montague: Express mail.

Hauser: No, she's gonna mail it.

Decker: If you mail it, ... I'll mail it at the Post Office today, it's okay.

Montague: Oh really. Okay that's fine.[30]

The defendants have characterized this sequence of conversations as evidence that the government orchestrated the mailing that provided federal jurisdiction for at least one of the RICO predicate offenses. This characterization ignores the general context provided by other evidence showing that the government's role in the mailing was not so extensive or outrageous that dismissal of the indictment or entry of a judgment of acquittal is required. The proposal was prepared and placed in the mail

[30] *Id.* at 8.

as a result of persistent requests by the defendants that Hauser and the agents provide Roemer with just such a written proposal. In their earliest meetings, Roemer had suggested that Hauser send him a written proposal concerning the insurance contract and made his assistant, Joseph Terrell, available to provide information needed for preparation of the proposal. As time passed and their discussions continued, Roemer began to press Hauser to send him the proposal. At a September 25, 1979 meeting in Baton Rouge, the following conversation took place:

> Roemer: Uh, I thought you was going to give me a proposition. I'm talking about a, what the, what you had to offer. You understand what I'm talking about?
>
> Hauser: Oh, I have a proposal the proposal. I'll have that when I come back Monday.
>
> Roemer: Okay.
>
> Hauser: A week from Monday.
>
> Roemer: Okay.[31]

On October 11, 1979, Roemer met Hauser again, this time in Lafayette:

> Roemer: Where's the damn paper you were going to have, I'm beginning to wonder about you fella.
>
> Hauser: Oh, man, I've been, I've been busy.
>
> Roemer: Well I haven't so I just (unintelligible)

* * * * * *

[31] Government exhibit 77-T, government transcript at 8.

> Roemer: When can, when can you give me this proposal?[32]

Finally, in a November 2, 1979 conversation with Marcello, Roemer again presses to be sent a proposal:

> Roemer: Well I have been doin' my thing. Gettin' closer and closer to their thing, but I need to hear. I need to see somethin', what their porposal is.[33]

Marcello had also noted the importance of providing Roemer with a proposal in his telephone conversation with Hauser of September 21, 1979 in which he scheduled the meeting between the agents and Roemer,[34] and on November 2, 1979 he assured Roemer that the proposal he desired was on its way to Roemer.[35] Thus, the preparation of the proposal and the act of sending it to Roemer were more the result of the prodding and persistent requests of the defendants than of government planning or instigation.

Contrary to the argument of the defendants, Roemer did not specifically expect or insist that the proposal be personally delivered to him rather than mailed. In support of this contention, the defendants rely principally on the following conversation between Roemer and Hauser on October 11, 1979 in Lafayette:

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[32] Government exhibit 102—t, volume 2, government transcript at 3.

[33] Government exhibit 110—t, government transcript at 31.

[34] Government exhibit 71-T, government transcript at 1-4.

[35] Government exhibit 110-T, government transcript at 32.

Hauser: ....I can have the proposal ready in the middle of next week. That's an intelligent answer.

Roemer: Uh huh. Where do you go from here? Do you go from New Orleans from here or you going where?

Hauser: I'm going to New Orleans from here and from then I'ma going to go back to LA for one day, draft the proposal, sit down with my actuaries, draft the proposal and I'm gonna either take a red eye from Houston here or stop in here and leave the proposal, eh...I could leave it with Carlos or could I leave it with Carlos and you could pick it up. Could that be possible?

Roemer: Whatever, whatever's convenient for you.

Hauser: That would be the best way if I were to shoot in on a plane and shoot right out.

Roemer: I could meet you at the airport if you like.

Hauser: Okay if you will. I don't want to impose on you...'cause I know what you gotta do.

Roemer: Yeah.

Hauser: Look I appreciate your job. I did it in 1960, okay, so I know what you're doing. You don't have time to go to the bathroom.

Roemer: You, you can, you can get it to him, and he could get it to me. We got all kinds of ways.

Hauser: Okay, I'll get it to Carlos then. Okay, sometime in the middle of the week, 'cause I'm

> going to have a meet with Carlos on the Florida situation. I'm gonna have the, the thing, okay....[36]

This conversation does not indicate, as defendants have contended, that Roemer was interested only in a personal delivery of the proposal and that the government manufactured the mailing only as a means of creating federal jurisdiction and an additional predicate offense for purposes of its RICO charge. The conversation shows merely an attempt by Hauser and Roemer to convenience each other, leaving a variety of possible methods of delivery open; it does not rule out use of the mails. Considered together with Roemer's numerous requests that he be sent a written proposal, it demonstrates Roemer's eagerness to receive the proposal by almost any means available. Moreover, there is ample evidence that Marcello and Roemer in fact subsequently agreed to the mailing and approved it.[37]

In short, the conduct of Hauser and the investigating agents, when viewed as a whole and together with the activities and conduct of the defendants, was not impermissibly outrageous and did not result in the artificial creation of federal jurisdiction. Both defenses require a level of governmental misconduct that far exceeds the bounds of legitimate undercover law enforcement techniques. In my view, the evidence indicates that the government agents' activities did not vary so dramatically from the bounds of accepted and permissible law enforcement practices that the governmental overreaching or

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[36] Government exhibit 102-T, volume 2, government transcript at 4-5.

[37] *See, e.g.*, portions of transcripts of tape-recorded conversations and text at notes 49-51 *infra*.

artificially created jurisdiction defenses could successfully be invoked. The evidence shows that the Brilab undercover operation in Louisiana merely afforded the opportunities and facilities for the commission of an offense. *See United States v. Russell, supra*, 411 U.S. at 4, 93 S.Ct. at 1644-45. The general thrust of the scheme, the specific direction it took, and the details of its execution, as well as the federal jurisdictional elements, were provided by the defendants. I conclude that viewed as a whole the conduct of the government in the Louisiana component of the Brilab investigation as it related to these two defendants does not require dismissal of the indictment or acquittal on grounds either of governmental overreaching or artificially created jurisdiction.

Selective Prosecution

Having heard the evidence at trial, and having provided an opportunity post-trial for the submission of any additional evidence the defendants desired to present for my consideration, I conclude that Marcello's claim that the government engaged in arbitrary and discriminatory selective prosecution against him is also without merit. Because criminal prosecutions are generally presumed to have been undertaken in good faith and nondiscriminatorily, *United States v. Blitstein*, 626 F.2d 774, 782 (10th Cir. 1980), *cert. denied*, 449 U.S. 1102, 101 S.Ct. 898, 66 L.Ed.2d 828 (1981); *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978); *United States v. Falk*, 479 F.2d 616, 619 (7th Cir. 1973), the burden of proving discriminatory selective prosecution is on the defendant who raises the defense. In the Fifth Circuit, the defendant bears the heavy burden of establishing (1) that he has been singled out for prosecution while others similarly situated have not generally been proceeded against for similar conduct; and (2) that the government's

discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.* based on such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *United States v. Uni Oil, Inc.*, 646 F.2d 946, 953-54 (5th Cir. 1981); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978).

Marcello has completely failed to sustain the heavy burden imposed upon him by the jurisprudence concerning his claim of selective prosecution. At trial, counsel for Marcello elicited some testimony from two FBI agents assigned to the Brilab investigation that Marcello has for years been the subject of an open FBI file and the object of FBI surveillance[38] and is considered a leading figure in organized crime.[39] Reference was also made during the trial to a government effort in 1961 to deport Marcello to Guatemala using what can at best be characterized as legally questionable means.[40] No convincing evidence was presented however, to support the defendants' contention

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[38] Trial testimony of Harold Hughes under direct examination by defendant Marcello, July 24, 1981, Trial Transcript at 9190, 9198.

[39] Trial testimony of Michael Wachs under cross-examination by defendant Marcello, May 26, 1981, Trial Transcript at 1678-79.

[40] Trial testimony of Harold Hughes and William Fleming under direct examination by defendant Marcello, July 24, 1981, Trial Transcript at 9177-82, 9190-98. Marcello's 1961 deportation to Guatemala is described in the district court's opinion in *United States ex rel. Marcello v. District Director etc.*, 472 F.Supp. 1199 (E.D.La.1979), *rev'd*, 634 F.2d 964 (5th Cir.), *cert. denied*, 452 U.S. 917, 101 S.Ct. 3052, 69 L.Ed.2d 421 (1981). In reversing the district court and affirming the Board of Immigration Appeals' denial of Marcello's application for suspension of his deportation, the Fifth Circuit said the 1961 deportation to Guatemala "was apparently executed illegally: arguably Marcello was shanghaied to Guatemala without prior notice to him or his attorney by means of a Guatemalian birth certificate that the Immigration and Naturalization Serivce (INS) may have known was a forgery." 634 F.2d at 966.

that Brilab was designed to "get Marcello" or that Marcello's prosecution was motivated by government frustration over its inability either to deport Marcello or to link him inextricably and concretely to organized crime. Marcello was not singled out for investigation and prosecution. Joseph Hauser's decision to cooperate with the government provided the investigators with a link to several individuals with whom Hauser said he had illicit dealings in the past. Marcello was in that group, and nothing was presented at trial to overcome the presumption that his prosecution was undertaken in good faith.

Sanctions for Leaks to the Press

Prior to trial, I denied defendants' motion to dismiss the indictment against them on grounds that government-initiated leaks to the news media concerning the Brilab investigation and subsequent grand jury proceedings had prejudiced them. I deferred ruling on the defendants' alternative motion for sanctions and provided the government an opportunity to supplement its proffer of affidavits of officials who participated in the grand jury proceeding. The government subsequently supplemented its response to the defendants' motion for sanctions by filing the affidavits of Wachs, Montague, Harold Hughes and Vincent Coyle, the FBI agents engaged primarily in the local Brilab investigation.[41] Each denied any involvement in leaks of information to the press. I have now reexamined all materials previously submitted to the court in connection with this motion, including the affidavits of government officials involved in the investigation, the Justice Department's Blumenthal Report, and the newspaper clippings

[41] Court Record Document No. 232. The affidavits of other government participants in the investigation are attached as exhibits to Court Record Document No. 131.

and transcript of a television newscast submitted by the defendants. I have determined based on this reiew that no further hearings or investigation of the alleged leaks are required and that imposition of sanctions against the government would be inappropriate. Accordingly, the defendants' motion for sanctions is denied.

Sufficiency of the Evidence

The defendants, particularly Roemer, contend in their post-trial motions that in order to establish a RICO conspiracy, the government must prove beyond a reasonable doubt that the defendant personally and actually agreed to participate in the affairs of an enterprise and to commit two or more predicate crimes as part of his participation in the affairs of that enterprise. Essentially, the argument of each defendant is that the evidence is insufficient to support a finding that each agreed to commit the requisite *two* predicate offenses, specifically because neither agreed to use the mails or interstate telephone facilities in furtherance of the scheme.

In determining these motions for judgments of acquittal on grounds of insufficiency of the evidence, I must view the evidence adduced during this lengthy trial in the light most favorable to the government. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *see Burks v. United States*, 437 U.S. 1, 16-17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978); *United States v. Marx*, 635 F.2d 436, 438 (5th Cir. 1981).

In the Fifth Circuit, the standard for proving the existence of a RICO conspiracy was established in *United*

States v. Elliott, 571 F.2d 880, 903 (5th Cir.), *cert. denied sub nom. Hawkins v. United States*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). In *Elliott* the court recognized that the object of a RICO conspiracy is to commit a substantive RICO offense by conducting or participating in the affairs of an enterprise through a pattern of racketeering activity. The gravamen of the RICO conspiracy charge is not that each defendant agreed to commit each of the separate predicate offenses that demonstrate the pattern of racketeering activity, but that "each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes...." *Id.* at 902. The court said:

> To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes*. One whose agreement with the members of an enterprise did not include this vital element cannot be convicted under the Act.

Id. at 903 (emphasis by the court). *Accord: United States v. Phillips*, 664 F.2d 971, 1038 (5th Cir. 1981); *United States v. Sutherland*, 656 F.2d 1181, 1189 (5th Cir. 1981); *United States v. Welch*, 656 F.2d 1039, 1056 n.24 (5th Cir. 1981); *United States v. Martino*, 648 F.2d 367, 383 (5th Cir. 1981); *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980).

Thus, while a substantive RICO charge requires proof of the existence of an enterprise which affects commerce and that the defendant participated in the conduct of the enterprise's affairs by committing at least two of the

designated acts of racketeering activity, "[a] RICO conspiracy charge requires the additional element of agreement; ... the agreement involved in a RICO conspiracy must include the vital element of agreeing to commit the predicate acts." *United States v. Martino, supra*, 648 F.2d at 383. This is not to say, of course, that a RICO conspiracy requires the actual commission of the requisite predicate offenses. No actual acts of racketeering need occur; there need only be an agreement by each defendant to commit two predicate offenses coupled with some overt act by one of the conspirators in furtherance of the conspiracy. *United States v. Phillips, supra*, 664 F.2d at 1038; *United States v. Sutherland, supra*, 656 F.2d at 1186-87 n.4; *United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981). Such an agreement may be proved by circumstantial evidence. United States v. Sutherland, supra*, 656 F.2d at 1188.

The defendants concede in their post-trial motions that the evidence, viewed in the light most favorable to the government, establishes an agreement to commit one predicate offense, the bribery of Roemer in violation of Louisiana law,[42] and I agree with this assessment of the evidence. The defendants argue, however, that there was no actual agreement to commit the requisite second predicate offense. Roemer's argument on this point and the government's response raise an important threshhold issue relating to the accuracy and sufficciency of the jury instructions concerning the bribery charged as a predicate offense to the RICO conspiracy in this case.

At various times during the trial and preparation of the instructions to the jury, I discussed with counsel the

[42] *See* Roemer's Memorandum in Support of his Post-trial Motion for a Judgment of Acquittal or, Alternatively, for a New Trial, Court Record document No. 548, at 2.

nature of the bribery charge involving Roemer and heard argument on the subject. The government contended during trial that the Roemer bribery component of the RICO scheme actually constituted three separate bribes and predicate offenses, specifically (1) the payment of $10,000 to Roemer in exchange for obtaining the state employees insurance contract; (2) the payment of an additional $15,000 in exchange for obtaining the same contract; and (3) the payment of a percentage of commissions to Roemer in exchange for maintaining the state insurance contract in place once it had been obtained by the agents. I rejected this argument at trial. The government now contends, however, that because I included in the instructions a reference to Paragraph (E) of Count Two of the indictment[43] in the section of the charge summarizing the forty-two page indictment for the jury, the instructions in fact allowed the jury to find an agreement to commit three separate briberies, and therefore three predicate offenses, as part of the Roemer transaction. The defendants argue in their post-trial memoranda that during preparation of the jury instructions I had agreed with their characterization of the transaction as a single offense.

I disagree with the government's contention that the instructions allowed the jury to find three separate predicate offenses in the Roemer bribery transaction. During the trial I agreed with the defendants that the Roemer bribery constituted only one predicate offense, and the jury instructions, examined and understood as a whole, reflect that view. The view of the Roemer transaction reflected

[43] Paragraph (E) of Count Two of the supreseding indictment, Court Record Document No. 56, at 17-18, was a two-page chronological listing and description of the specific acts which the indictment alleged and the government contended constituted bribery in violation of Louisiana law.

in the jury instructions was based on my interpretation of the Louisiana bribery statute, La.Rev.Stat.Ann. § 14:118 (West Supp.1980), in light of the published Loouisiana Supreme Court jurisprudence available at the time of trial, *State v. Ponthier*, 391 So.2d 1138 (La. 1980),[44] and the evidence adduced during the proceedings. The statute and the *Ponthier* case define bribery in violation of Louisiana law in terms of specific intent to influence official conduct rather than in terms of amounts or installments of money paid to gain that influence. At trial, I concluded that the payments offered to or accepted by Roemer constituted a single bribery offense, and therefore a single predicate crime for RICO purposes, because each payment or promise to pay was made to influence only the single official act of obtaining the state employees insurance contract for the agents.

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[44] After the jury instructions in the Brilab case were given and the verdicts rendered, two additional cases relevant to the issue of the number of bribery offenses included in the Roemer-Marcello transaction were published. In *United States v. Colacurcio*, 659 F.2d 684 (5th Cir. 1981), decided almost three months after the Brilab verdicts were returned, and *State v. Hebert*, 402 So.2d 675 (La.1981), decided on June 22, 1981 but not published until after a motion for rehearing had been denied in September 1981, the courts recognized that a series of payments made, not to influence a single act of official conduct, but to provide continuing protection or influencce over a period of time, could be considered separate bribes and separate offenses. These decisions arguably would allow the Roemer-Marcello transaction to be considered as at least two separate bribes consisting of (1) the payment of $25,000 cash in "up-front" money, albeit in two separate installments, in exchange for obtaining the insurance contract for the agents, and (2) the payment of a monthly commission to Roemer in exchange for exercising his influence to maintain the ccontract in place. In light of my conclusion, however, that the jury instructions allowed the jury to consider the Roemer-Marcello transaction as only a single bribery and, therefore, a single predicate offense for RICO purposes, *see* text at pages 1380-82, I find it unnecessary to address the effect of these two recently published decisions on my previously expressed view of the transaction since the defendants suffered no prejudice, and in fact benefitted, from jury instructions that treated the transaction only as a single bribery offense.

In determining the sufficiency of the jury instructions on this threshhold point, I must examine the entire charge, viewing it as a whole. *see Davis v. McCallister*, 631 F.2d 1256, 1260 (5th Cir. 1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981); *United States v. Abravaya*, 616 F.2d 250, 251 (5th Cir. 1980); *United States v. Diecidue*, 603 F.2d 535, 548 (5th Cir. 1979), *cert. denied sub nom. Antone v. United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980); *United States v. Fontenot*, 483 F.2d 315, 322 (5th cir. 1973). In this case, the construction of the charge itself and a reading of the charge as a whole demonstrate that the jury was instructed that the Roemer transaction could comprise only one predicate offense. The instructions contain two references to the predicate offenses comprising the "pattern of racketeering activity" charged against the defendants. The first, upon which the government relies for its argument, is a general reference appearing in a portion of the charge linking the acts alleged in the indictment to an explanation of the term "pattern of racketeering activity." The instruction states:

> The pattern of racketeering activity charged in Count Two includes public bribery in violation of Louisiana law as listed in Paragraph (E) of Count Two; and interstate travel in aid of unlawful activity, wire fraud, and mail fraud in violation of provisions of the United States Code as charged in Counts Three through Twelve of the indictment.[45]

The reference to Paragraph (E) of Count Two of the indictment is a general reference applying to all defendants that was added to the instructions shortly before the close of the case at the government's request without objection by the

[45] Jury Instructions, Court Record Document No. 438, at 22.

defendants. No attempt was made at this point in the instructions to distinguish among defendants or to enumerate specifically which particular predicate offenses were to be considered as to individual defendants.

A specific enumeration of the particular RICO predicate offenses to be considered against each defendant was contained later in the charge.[46] Where the law and evidence supported an instruction on more than one bribery offense by a defendant, the jury was instructed accordingly. Thus, the instructions concerning the predicate offenses to be considered against Marcello, Davidson, and Marinello described two separate bribery offenses against each—the separate briberies of Roemer and then-Lieutenant Governor James E. Fitzmorris, Jr. The instructions concerning Roemer, in contrast, describe only a single act of public bribery in addition to the mail and wire fraud offenses charged against him:

> Defendant Charles E. Roemer, II, is charged with committing public bribery by accepting money in exchange for use of his official position and influence to obtain insurance contracts;....[47]

This view of the instructions is particularly reflected when the instructions concerning Roemer are read in context and together with those concerning the other defendants, whose dealings with Roemer were described in the same section of the instructions as a single bribery separate from the second alleged bribery offense relating to their dealings with Fitzmorris. The earlier reference in the instructions to Paragraph (E) of Count Two of the indictment in no way

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[46] *Id.* at 33 35.

[47] *Id.* at 35.

affected the overall import of the specific instructions contained later in the charge on what and how many predicate acts had been alleged against each defendant.

Accordingly, I conclude that the charge allowed the jury to consider the Roemer-Marcello bribery transaction as only a single predicate offense for RICO purposes. I therefore must determine whether the evidence presented at trial was sufficient to support a jury finding that, in addition to the Roemer-Marcello bribery, the defendants agreed to commit one or more additional predicate offenses of mail or wire fraud. The parties disagree, as a threshhold matter, about whether it was necessary for the government to prove an agreement by the defendants actually to use the mails or to use interstate wire facilities in furtherance of their scheme to satisfy the agreement requirement of a RICO conspiracy offense. As to the mail fraud predicate offense, for example, the defendants argue that the Fifth Circuit's standards established in mail fraud conspiracy cases are applicable here. While some courts have rejected the view that actual agreement to use the mails is required to prove a mail fraud conspiracy, *see United States v. Craig*, 573 F.2d 455, 485 (7th Cir. 1977), *cert. denied*, 439 U.S. 820, 99 S.Ct. 83, 58 L.Ed.2d 110 (1978); *United States v. Mauro*, 501 F.2d 45, 51 (2d Cir.), *cert. denied*, 419 U.S. 969, 95 S.Ct. 235, 42 L.Ed.2d 186 (1974), the Fifth Circuit has stated that "the basis for the offense of conspiracy to commit mail fraud is an agreement to use the mails to defraud." *United States v. Kent*, 608 F.2d 542, 547 (5th Cir. 1979), *citing Pereira v. United States*, 347 U.S. 1, 11, 74 S.Ct. 358, 364, 98 L.Ed. 435 (1954). The defendants therefore contend that the government was required to prove an agreement actually to use the mails or interstate wire facilities in order to support the RICO conspiracy convictions. The government, on the other hand, argues that no such agreement

actually to use the mails or interstate wire facilities was required as long as it proved an intent and agreement to defraud and subsequent use of the mails or interstate wire facilities in furtherance of the scheme.

I find it unnecessary at this time to choose between the alternative theories advanced by the parties because, even applying the higher standard of proof advanced by the defendants, I conclude that there was ample evidence, when viewed in the light most favorable to the government, to support a finding that both defendants actually agreed to use the mail and interstate telephone calls as part of their agreement to commit two or more predicate offenses in the RICO conspiracy.[48]

Several circumstances, viewed in combination, support this conclusion. Both Marcello and Roemer knew from the outset of their dealings with Hauser and the agents that their operation was based in California. Hauser and the agents kept the defendants apprised, often at the defendants' requests, of their travel plans and schedule. The scheme in which the defendants were involved was broad in scope, concerning a large-scale change in a substantial state employees insurance program. Effecting such a

[48] The defendants have argued, citing *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 48 (1977), that if there is insufficient evidence to support *either* an agreement to commit mail fraud *or* an agreement to commit wire fraud as the requisite additional predicate offense, the Rico conviction cannot stand since the jury's verdict does not specifically reflect which two or more predicate offenses the defendants were found to have agreed to commit. The Fifth Circuit has not expressly embraced the viewpoint expressed by the Third Circuit in *Dansker*. *See United States v. Peacock*, 654 F.2d 339, 348 (5th Cir. 1981). Because I find sufficient evidence to support agreement by the defendants to commit *both* mail and wire fraud, I find it unnecessary to address the issues raised by the defendants' assertion of the *Dansker* point-of-view and the government's opposition to those assertions.

change required the defendants to engage in ongoing discussions, meetings, and the exchange of information and proposals with Hauser and the agents. The nature of the plan to obtain the state insurance contract and the fact that the defendants knew the Hauser group was based cross-country indicate that the defendants contemplated the use of the mail and interstate phone calls which occurred in furtherance of the scheme. Certainly, Marcello's agreement to use interstate phone calls in furtherance of the scheme can be gleaned from his September 21, 1979 call to Hauser in which he scheduled a meeting of Roemer, Hauser and the agents.[49] Roemer's agreement to the September 21 call may be inferred from the fact that he had met with Marcello earlier that day at the St. Ann Hotel in New Orleans, agreed to meet with Hauser and the agents, and, in effect, authorized Marcello to arrange the meeting. The evidence further indicates that both Marcello and Roemer wanted Hauser and the agents to provide Roemer with a written proposal concerning the insurance program. On several occasions they asked for such a proposal and encouraged the government agents to prepare it for Roemer's use in obtaining the contract on their behalf.[50] On November 2, 1979, the same day Hauser's written proposal was mailed to Roemer, Marcello and Roemer engaged in a telephone conversation which, viewed against the background of their often-expressed desire for such a proposal and their knowledge of Hauser's operation and the nature of the scheme in which they were involved, indicates their assent and agreement to that specific mailing in furtherance of the plan to obtain the state employees insurance contract:

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[49] Government exhibit 71-T, government transcript at 1-4.

[50] *See, e.g.*, portions of transcripts of tape-recorded conversations quoted in text at notes 31-35 *supra*.

Roemer: Listen, uh. Have you talked to those fellows out...Cal...

Marcello: Yeah, they been talkin' to me, man. Everyday, I talk to 'em, but ya know, I said well let me call. I know you have been so damn busy, ya know.

Roemer: Well, I...

Marcello: I said well I don't know what the man doin'. I said but I'm a find out.

Roemer: Well I have been doin' my thing. Gettin' closer and closer to their thing, but I need to hear, I need to see somethin', what their proposal is.

Marcello: Well they got a proposal. They save, savin' uh little over a million dollars man.

Roemer: What do I need to do?

Marcello: Well...

Roemer: How do I get with 'em?

Marcello: He get the, I believe he mailed ya a letter yesterday.

Roemer: *Okay. That's good then.*

Marcello: Mailed ya a letter yesterday. Ya oughta have it probably Monday mornin'.

Roemer: Well I've laid all the ground work for it and it all looks good right now.

Marcello: Looks good?

Roemer: Yeah. Looks good.

Marcello: Well all right. Cause they're ready.

Roemer: Okay.

Marcello: They're ready. Aggravating me, ya know?

Roemer: Yeah.

Marcello: All right so. You get that letter Monday, give me a uh a call, or tell Aubrey to call me.

Roemer: All right. All right.[51]

Thus, the evidence viewed as a whole and in the light most favorable to the government reveals a transaction in which discussions and the exchange of information between individuals in different locations were essential, and shows not only the expectation that the mail and interstate phone calls would be used to further the scheme, but also the defendants' assent and approval of the use of those means of effecting the plan. I conclude, therefore, that the government presented sufficient evidence to support the jury's verdict finding Marcello and Roemer guilty of a RICO conspiracy because the evidence shows that the defendants objectively manifested an agreement to commit two or more predicate offenses.

Insufficiency of the Jury Instructions

The defendants argue in their post-trial motions that my instructions to the jury were deficient in several

[51] Government exhibit 110-T, government transcript at 31-32 (emphasis added).

respects. In examining the defendants' objections to the jury instructions, I must determine whether the entire charge, taken as a whole, adequately presented the issues and the law to the jury. *United States v. Diecedue, supra*, 603 F.2d at 548; *United States v. Abravaya, supra*, 616 F.2d at 251. Specific instructions to a jury "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973), and the charge's correctness is measured not by isolated passages but in light of the charge as a whole. *United States v. Rouse*, 452 F.2d 311, 314 (5th Cir. 1971).

The defendants argue that the jury instructions on the "agreement" element of the RICO conspiracy offense failed adequately to articulate the specifics of an agreement to commit the particular predicate offenses charged. Instructions concerning the agreement aspect of the RICO conspiracy were set out in several portions of the charge. The jury was instructed in general terms that a conspiracy is "a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose" and "a combination or mutual agreement by two or more persons to disobey or disregard the law."[52] In language derived from the Fifth Circuit's leading RICO conspiracy decision, *United States v. Elliott, supra*, the instructions explained that an essential element of the offense which the government must prove beyond a reasonable doubt is that each defendant "willfully became a member of the conspiracy by objectively manifesting, through his words or actions, an agreement to participate, directly or indirectly, in the affairs of the enterprise through the commission of two or more offenses that

[52] Jury Instructions, Court Record Document No. 438, at 17.

comprise a pattern of racketeering activity."[53] Later in the charge, the jury was specifically instructed on the particular predicate offenses with which each defendant was charged.[54] The structure and substance of the RICO conspiracy charge used in the instant case were essentially the same as those used by the district court and approved by the Fifth Circuit in *United States v. Bright*, 630 F.2d 804, 821-23 (5th Cir. 1980). I find that, viewed as a whole, the jury was adequately apprised of the issues and law applicable to the "agreement" element of the RICO conspiracy of which these defendants were convicted.

The defendants also contend that the jury instructions concerning the requirement that the activities of the enterprise must affect interstate commerce were erroneous. As to the interstate commerce element of the RICO offenses alleged in the indictment, the jury was instructed as follows:

> With respect to the requirement that the "enterprise" was engaged in, or that its activities affected, interstate commerce the government contends that in conducting the affairs of the enterprise the defendants made or caused to be made interstate telephone calls and that the defendants Marcello and Davidson travelled or caused travel from one state to another in aid of unlawful activity.
>
> If you find beyond a reasonable doubt that these transactions or events occurred, and that they occurred in or as a direct result of the conduct of the affairs of the alleged enterprise, the requisite effect upon interstate commerce has been

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[53] *Id.* at 18-19.

[54] *Id.* at 33-35.

> established. If you do not so find, the requisite effect upon interstate commerce has not been established.[55]

This instruction was based on the Fifth Circuit's decision in *United States v. Malatesta*, 583 F.2d 748, 754-56 (5th Cir. 1978), *rehearing en banc* 590 F.2d 1379 (5th Cir.), *cert. denied sub nom Bertolotti v. United States*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979), and the Fifth Circuit's Pattern Jury Instructions for Criminal Cases. In *Malatesta*, the court found that interstate telephone calls made as part of the conduct of the affairs of a RICO enterprise were alone sufficient to satisfy the RICO requirement of an effect on interstate commerce. The view expressed in *Malatesta* is consistent with the decisions of other courts that, although an effect on commerce is an essential element of a RICO offense, the required nexus is not great and a minimal effect on interstate commerce satisfies the jurisdictional element. *United States v. Bagnariol*, 665 F.2d 877, 892 (9th Cir. 1981); *United States v. Barton*, 647 F.2d 224, 233 (2d Cir.), *cert. denied*, __ U.S. __, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981). Unpersuaded by the defendants' attempts to distinguish *Malatesta* and convinced that *Malatesta* establishes controlling precedent on this point, I find the defendants' objections to the jury instructions concerning the interstate commerce element of the RICO offense without merit.

Elements of the RICO Offense: Insufficiency of the Pattern and the Enterprise

The heart of a RICO offense is the conduct of the affairs of an enterprise through a pattern of racketeering

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[55] *Id.* at 36.

activity. 18 U.S.C. § 1962(c); *United States v. Phillips*, *supra*, 664 F.2d at 1011; *United States v. Elliott*, *supra*, 571 F.2d at 899 n.23. RICO does not criminalize either associating as an enterprise or engaging in a pattern of racketeering activity standing alone; both elements are essential to commission and conviction of a RICO substantive or conspiracy offense. *United States v. Turkette*, 452 U.S. 476, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981); *United States v. Phillips*, *supra*, 664 F.2d at 1011-13. In the instant case, the defendants argue that the government has failed to prove either a sufficient "pattern" of racketeering activity as described by the jurisprudence interpreting RICO or the existence of an enterprise separate from whatever predicate offenses may have been committed.

The defendants contend essentially that the pattern of racketeering activity charged in this case, in light of the evidence presented at trial, is insufficient for RICO purposes because the mail and wire fraud acts charged as predicate offenses in addition to the Marcello-Roemer bribery transaction were merely manifestations and part of the single state bribery scheme. Since the mail and wire fraud predicate offenses are intertwined with the state bribery scheme, the defendants argue that no adequate "pattern" of separate offenses within the meaning of RICO has been established. I agree with the defendants that the evidence clearly showed that every act charged as a predicate offense against these defendants was related to a single scheme to obtain the state employees insurance contract. For example, the bribery of Roemer, the September 11, 1979 telephone call in which Marcello arranged a meeting between Roemer and the agents, and the November 2, 1979 mailing of the written proposal from the agents to Roemer all were done in furtherance of a single plan to

obtain the state contract. The jurisprudence of the Fifth Circuit, however, applies RICO broadly—broadly enough, in fact, to include within the term "pattern of racketeering activity" several distinct offenses which all arise from the same criminal scheme.

In orally denying defendants' post-trial motions on this point, I relied principally on the Fifth Circuit's broad application of RICO to the fact situation presented in *United States v. Martino, supra*, in which mail fraud offenses arising from an arson and fire insurance fraud scheme were used as predicate offenses for RICO convictions. Since my oral ruling, the Fifth Circuit has made clear that several predicate offenses arising from a single criminal scheme may constitute a pattern of racketeering activity for RICO purposes. In *United States v. Phillips, supra*, the court reiterated that the predicate acts necessary for finding a pattern of racketeering activity must be two separate crimes. "These crimes need not, however, be in the context of independent schemes or objectives." *Id.* at 1038. The court found that a defendant could be validly convicted of a RICO conspiracy, even though the conspiracy had a single criminal objective, "so long as (the defendant) committed or agreed to commit at least two separate crimes in furtherance of the conspiracy's single objective." *Id.* at 1039. Thus, while the mail and wire fraud offenses which serve as additional predicate offenses for the pattern of racketeering activity in the Brilab case were indeed related to the state bribery scheme which comprised the initial predicate offense, they were separate offenses for purposes of establishing a RICO pattern of racketeering activity.

The defendants' assertion that the government failed to prove the existence of an enterprise separate from the

mere commission of the predicate offenses is also without merit. The term "enterprise" is broadly defined by the RICO statute itself as any individual or group of individuals *associated in fact* although not a legal entity. 18 U.S.C. § 1961(4) (emphasis added). In *United States v. Turkette, supra*, the Supreme Court afforded the term "enterprise" a broad interpretation consistent with the clear language of the statute itself. The Court said an enterprise may consist of "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette, supra*, 101 S.Ct. at 2528. The existence of a RICO enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* The Court noted that the "enterprise" is not the "pattern of racketeering activity" and that proof of one does not necessarily establish the other. *Id.*

In this case, the government amply proved an agreement to participate in an enterprise separate and apart from the mere commission or agreement to commit acts of racketeering activity. Marcello and Roemer directly discussed the arrangements for obtaining the state employees insurance contract, as well as the political machinations indirectly related to their plan, and other matters on several occasions. They arranged meetings, exchanged ideas, and made plans between themselves, with others, and through intermediaries. The government proved an association in fact between these two individuals, and an agreement to associate together, that fits within the broad definition of "enterprise" provided by the RICO statute and by the jurisprudence interpreting it.

Conclusion

The Brilab investigation in Louisiana, and the resulting criminal indictments and trial, have produced two convictions and a voluminous record of pleadings, documents, judicial decisions, and evidence, all of which undoubtedly will be reviewed again by other judges and courts. The legal and factual contentions asserted by the defendants for the most part raise serious and in some respects significant questions of law, policy, and priorities. In my view, however, the verdicts of the jury, whose service and attentiveness through eighteen arduous weeks of trial deserve particular commendation, are supported by the law and the evidence. Accordingly, the defendants' motions to dismiss the indictment and for entry of judgments of acquittal or for a new trial must be denied in all respects.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3040

D. C. Docket No. CR-80-274-G

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES E. ROEMER, II and
CARLOS MARCELLO,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

Before GOLDBERG, GEE and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 11, 1983

ISSUED AS MANDATE: APR 15 1983

A true copy

Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /S/JOAN PERKINS
Deputy

New Orleans, Louisiana APR 15 1983

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3040

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES E. ROEMER, II and
CARLOS MARCELLO,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 04/11/83, 5 Cir., 198__, __ F.2d __).

(May 16, 1983)

Before GOLDBERG, GEE and RANDALL, Circuit Judges.

PER CURIAM:

(✓)Treating the suggestion for rehearing en banc filed by Charles E. Roemer, II, as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Supreme Court, U.S.
FILED
SEP 30 1983

Nos. 83-29 and 83-169

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES E. ROEMER, II, PETITIONER

v.

UNITED STATES OF AMERICA

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted under the conspiracy provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d) (No. 83-169).

2. Whether the use of the United States mails in this case provided an adequate basis for the charge of mail fraud as one of the predicate offenses in the RICO count (No. 83-29).

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-29

CHARLES E. ROEMER, II, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-169

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (83-29 Pet. App. A1-A5) is reported at 703 F.2d 805. The opinions of the district court (83-29 Pet. App. A6-A55, A56-A105) are reported at 508 F. Supp. 586 and 537 F. Supp. 1364.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1983. Petitions for rehearing were denied on May 16, 1983, and May 31, 1983. The petition for a writ of certiorari in No. 83-29 was filed on July 11, 1983. The petition in No. 83-169 was filed on July 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. 1962(d).[1] The district court denied their post-verdict motions (83-29 Pet. App. A56-A105) and sentenced petitioner Marcello to seven years' imprisonment and petitioner Roemer to three years' imprisonment. The court of appeals affirmed (*id.* at A1-A5).

Petitioners' convictions followed an extensive Department of Justice investigation into illegal activities involving public officials, labor unions, and reputed organized crime figures in the Southwest.[2] As part of its investigation the FBI established and staffed a fictitious insurance company in California. Joseph Hauser, a convicted insurance swindler (Tr. 8-9, 4173-4174), cooperated with the undercover investigation and posed as a broker for the fictitious company (Tr. 20, 21, 28-30, 694, 4211).[3]

The evidence at trial, which is not in dispute, showed that in 1979 petitioner Marcello agreed to bribe state and local public officials in Louisiana in order to assist Hauser in obtaining public employee insurance contracts; in return, Marcello was to receive a percentage of Hauser's commissions. In a conversation consensually recorded by Hauser (Gov't Exh. 9), Marcello assured Hauser of his influence

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[1] Petitioners were acquitted on 11 other counts charging a substantive RICO offense, mail and wire fraud, and interstate travel in aid of racketeering.

[2] This investigation has come to be called "Brilab," which derives from the term "bribery-labor."

[3] The citations to the record herein are taken from the government's brief in the court of appeals.

with both New Orleans and Jefferson Parish officials (Tr. 100, 691-693, 4260-4261; Gov't Exh. 9, at 2, 33-34, 45, 47-48, 52-53). Marcello then introduced Hauser to petitioner Roemer for the purpose of bribing Roemer in order to obtain the contracts.

At the time, Roemer was the Louisiana Commissioner of Administration, Executive Assistant to the Governor of Louisiana, and campaign manager for a Democratic gubernatorial candidate. Roemer was described by Marcello and co-defendant Irving Davidson[4] as "the top man," the "decision maker," and "the guy who was in charge" (Tr. 22, 823, 825, 6117; Gov't Exh. 40, at 1-2; Gov't Exh. 41, at 1; Gov't Exh. 42, at 5; Gov't Exh. 44, at 1). Roemer agreed to use his influence to deliver the state employees' group insurance contract in exchange for an advance payment of $25,000 and a 50% share of the future commissions, estimated at between $80,000 and $100,000 per month (Tr. 949-950, 953-955, 957-958; Gov't Exh. 58, at 2, 3, 5-6, 7-8, 9-10). Hauser later made two cash payments to Roemer involving a total of $25,000 (Tr. 1389, 1394, 4295, 4301, 4307, 6157; Gov't Exh. 77, at 8; Gov't Exh. 102, vol. 2, at 5).

ARGUMENT

1. Petitioner Marcello contends (83-169 Pet. 9-20) that the convictions in this case under the conspiracy provision of RICO were improper. He argues that the decision below "effectively eliminates the necessity of proving the existence of an enterprise as a separate element of the crime" (83-169 Pet. 9).

a. By its terms, the conspiracy provision of RICO (18 U.S.C. 1962(d)) makes it "unlawful for any person to conspire to violate any of the provisions of subsection * * * (c)

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[4]Davidson, as well as two other co-defendants, were acquitted on all charges against them.

of this section" — that is, to conspire "to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity" (18 U.S.C. 1962(c)). Thus, a RICO conspiracy charge, like a RICO substantive charge (*United States* v. *Turkette*, 452 U.S. 576, 583 (1981)), requires an "enterprise" as a separate element of the offense.

This Court has recognized that, in cases in which the enterprise is a "group of individuals associated in fact" (18 U.S.C. 1961(4)), the proof of the enterprise may often "coalesce" with the proof of the predicate acts that constitute the pattern of racketeering activity. *United States* v. *Turkette*, *supra*, 452 U.S. at 583; see also *United States* v. *Mazzei*, 700 F.2d 85, 88-89 (2d Cir.), cert. denied, No. 82-6449 (May 23, 1983); *United States* v. *Lemm*, 680 F.2d 1193, 1199 (8th Cir. 1982), cert. denied, No. 82-5371 (Jan. 10, 1983). Likewise, in a RICO conspiracy case, the government may use the same evidence to prove both the enterprise element and the agreement to commit a substantive RICO violation. See *United States* v. *Lemm*, *supra*, 680 F.2d at 1199; *United States* v. *Bagnariol*, 665 F.2d 877, 890-891 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Griffin*, 660 F.2d 996, 1001 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); *United States* v. *Martino*, 648 F.2d 367, 382-383 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982). Indeed, where the enterprise consists of a group of individuals associated in fact for illegal purposes, the evidence of the defendants' association generally will overlap with the evidence of their conspiratorial agreement. See *United States* v. *Bagnariol*, *supra*, 665 F.2d at 891. But, as in *Turkette*, this similarity in proof does not gainsay that the agreement and enterprise elements of the RICO conspiracy

offense are "separate element[s] which must be proved by the Government" (452 U.S. at 583).[5]

In this case the district court instructed the jury on the agreement and enterprise elements of the RICO conspiracy charge (Supp. R. 23-30). Contrary to petitioner Marcello's contentions, these instructions adequately apprised the jury of the determinations necessary in order to return a verdict of guilty.[6]

b. Petitioner first asserts (83-169 Pet. 12) that the district court's introductory description of the conspiracy count, by stating the issue to be whether the defendants "unlawfully, willfully, and knowingly conspired to associate in fact as an enterprise * * * for the purpose of obtaining insurance contracts through a pattern of racketeering acitivity" (Supp. R. 25), was improper because it allowed the jury to find, "in effect, a conspiracy to conspire" (83-169 Pet. 12). Even

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[5]This does not mean, contrary to petitioner's assertion (83-169 Pet. 16), that "every conspiratorial confederacy to commit predicate offenses would be punishable as a RICO violation." For example, an agreement to commit two isolated or sporadic criminal acts, while sufficient to establish a conventional conspiracy, would not be a RICO conspiracy offense. Compare *United States* v. *Turkette*, *supra*, 452 U.S. at 583 n.5. But such a situation is a far cry from the organized and ongoing association involved in this case (see page 8, *infra*).

[6]There is a serious question whether petitioner's challenge to the instructions is properly before this Court, since petitioner failed to object to the court's charge. Only counsel for Marinello, an acquitted co-defendant, objected to the charge, and his objections were in the form of written objections submitted before the charge conference (13 R. 3547). At the charge conference, petitioner did not claim that the RICO charge was incorrect (Tr. 9566-9614). In these circumstances, we doubt whether, absent plain error, petitioner sufficiently preserved the issue to entitle him to raise it now. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982); *Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977); *Singer* v. *United States*, 380 U.S. 24, 38 (1965); *United States* v. *Mazzei*, *supra*, 700 F.2d at 87-88.

standing alone, we do not believe that this instruction was erroneous or would have confused or misled the jury. But at all events, this portion of the charge to the jury did not purport to be a complete statement of the offense. The court followed this shorthand description with a full and accurate exposition of the elements of RICO conspiracy, both in general and as applied to this case (Supp. R. 25-29). The court's fuller recitation of the elements of the offense did not contain the language "conspired to associate in fact" to which petitioner now objects. "[V]iewed in the context of the overall charge" (*Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973); see also Supp. R. 6), the court's instruction on this point was not in error.

c. Petitioner next complains (83-169 Pet. 13) of the court's explanation that "a conspiracy is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose" (Supp. R. 25; see also *id.* at 26).* He argues that this instruction permitted the jury to convict based on a finding of an association to attempt to violate the law. While it might be preferable for courts to avoid using the term "attempt," because that term has a special legal significance in other settings, the instruction given in this case was most unlikely to be confusing to lay jurors unfamiliar with the principles applicable to the law of "attempt." Rather, to a lay jury the instruction given was likely to convey precisely what it was meant to convey —that a conspiracy is an agreement to commit an offense, but that it does not require that the agreement actually result in the consummation of a completed offense. This is particularly true in light of the fact that the remainder of the court's conspiracy instruction

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*This is the definition set out in the Fifth Circuit's pattern instruction booklet. See U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions — Criminal Cases* 60 (1978).

correctly and comprehensively described the concept of conspiracy to the jury, including the express statements that a conspiracy is a "mutual agreement by two or more persons to disobey or disregard the law" (Supp. R. 25) and that, in contrast to the conspiracy charge, the substantive RICO charge required that the defendants must have "accomplished the objects and purpose of the conspiracy alleged in count one" (Supp. R. 29).

d. In addition, petitioner challenges (83-169 Pet. 14-15) the court's instruction that, as an element of the substantive RICO offense, the government must prove beyond a reasonable doubt "[t]hat the defendant was associated with an enterprise" (Supp. R. 30). Petitioner urges that this instruction was improper because it permitted the jury to assume the existence of the enterprise and did not inform the jury that it must find the existence of an enterprise separate and apart from the pattern of racketeering activity. Again, there is no merit to this contention. Rather, it was entirely proper for the court to instruct the jury that, in order to convict, it must find beyond a reasonable doubt "that the defendant was associated with an enterprise." The court had defined the term "enterprise" before giving this instruction (Supp. R. 24), and it did so again immediately afterwards (Supp. R. 30). The court also charged the jury that it must find beyond a reasonable doubt that the enterprise engaged in or its activities affected interstate commerce (Supp. R. 30). The court's charge further stated that, in addition to finding that the defendant was associated with an enterprise, the jury must find that the defendant conducted or participated in the affairs of the enterprise through the commission of two or more connected offenses (Supp. R. 31). And the court defined the terms "racketeering activity" and "pattern of racketeering activity" and made it clear that these elements refer to criminal acts (Supp. R. 24). Accordingly, the jury was adequately apprised of the different elements of the RICO substantive offense.

e. Finally, petitioner suggests (83-169 Pet. 11, 19-20) that the evidence was insufficient to prove the existence of an enterprise. This claim is unavailing. Viewed in the light most favorable to the government (*Jackson* v. *Virginia*, 443 U.S. 307, 317-319, 324, 326 (1979)), the evidence demonstrated that the defendants functioned as a continuing unit with the shared objective of obtaining insurance contracts through unlawful means, and thus it sufficed to establish the requisite enterprise. See *United States* v. *Turkette*, *supra*, 452 U.S. at 580, 583.

The activities of the defendants at issue in this case extended over a period of approximately one year, from February 1979 to February 1980 (83-29 Pet. App. A58-A59). In addition, each of the defendants, as well as Hauser and the undercover FBI agents, played a specific role in the scheme. In particular, petitioner Marcello established an informal organization to obtain insurance contracts through bribery in local, statewide, and out-of-state areas; to this end, Marcello involved petitioner Roemer, who, as the "top man" and the "decision maker" (see page 3, *supra*), was critical to the operation with respect to the state employees' insurance contract and also took part in the efforts to obtain other contracts as well. Furthermore, a large number of meetings and other contacts occurred among the participants (83-29 Pet. App. A59-A60), and, in order to conceal the direct evidence of their involvement, petitioners used co-defendant Young as an intermediary in communicating with each other to set up meetings or pass messages (see, *e.g.*, Gov't Exh. 161; Gov't Exh. 162, at 1-3). This record plainly supports the district court's conclusion, affirmed by the court of appeals (83-29 Pet. App. A3), that (*id.* at A104) "the government amply proved an agreement to participate in an enterprise separate and apart from the mere commission or agreement to commit acts of racketeering activity." See *United States* v. *Griffin*, *supra*, 660 F.2d at 1001. And,

contrary to Marcello's assertion (83-169 Pet. 11, 20), the fact that the evidence established a conventional conspiracy as well as a RICO offense does not cast doubt on the validity of the RICO conviction. Cf. *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979).[8]

2. As the case went to the jury, the RICO conspiracy count charged three predicate acts of racketeering with respect to petitioner Roemer — bribery, wire fraud, and mail fraud.[9] Roemer concedes that he agreed to commit

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[8] *United States* v. *Bledsoe*, 674 F.2d 647 (8th Cir.), cert. denied, No. 82-5071 (Nov. 29, 1982), upon which petitioner relies (83-169 Pet. 16-17), does not compel a different conclusion. First, *Bledsoe* relied (674 F.2d at 664-665) on the decision of the Fourth Circuit in *United States* v. *Griffin*, *supra*, which, as petitioner concedes (83-169 Pet. 17), is contrary to his position here. Moreover, the record in this case, as outlined above, is adequate to meet the *Bledsoe* standard, including, in particular, the requirement that the enterprise "must have an 'ascertainable structure' distinct from that *inherent* in the conduct of a pattern of racketeering activity" (674 F.2d at 665 (emphasis added)); the operations involved in the fraud and bribery scheme extended well beyond those "necessary to perpetrate the predicate crimes" (*ibid.*) and were comparable to those in the prostitution ring cited in *Bledsoe* as an example of an enterprise (*ibid.*, citing *United States* v. *McLaurin*, 557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978)). Nothing in *Bledsoe* or in any other authority cited by petitioner supports his proposed test (83-169 Pet. 18) that "RICO conspirators at a minimum must have the common bond of furthering the larger goals of the enterprise apart from furthering the lesser goal of committing the specific offenses charged as predicate acts," and such a test would be, we submit, at odds with this Court's decision in *United States* v. *Turkette*, *supra*.

[9] Initially, two additional acts of wire fraud were charged against Roemer, but the district court granted a judgment of acquittal on those counts before the case was submitted to the jury. The predicate acts of racketeering charged against petitioner Marcello consisted of one act of bribery, eight acts of wire fraud, one act of interstate travel in furtherance of the bribery and fraud scheme, and one act of mail fraud. See 83-29 Pet. 12 n.13; 83-29 Pet. App. A61 n.7; 83-169 Pet. 3-4 & nn. 2, 3. In the court of appeals Marcello did not dispute that he had agreed to commit at least two predicate offenses necessary to establish a pattern of racketeering activity. See Gov't Br. 46 n.26.

bribery (83-29 Pet. 11), and he does not challenge in this Court the validity of the predicate act of wire fraud (*id.* at 12 n.13). However, relying on theories of statutory construction, federal jurisdiction, and due process, he asserts (*id.* at 11-22) that the predicate act of mail fraud was invalid because the government "orchestrated [the] mailing" (*id.* at 11) in that the "mailing [was] evidenced solely by a letter that was conceived, chosen and executed by government agents" (*id.* at 12). This claim rests on a misconstruction of the record.

The mailing at issue was an insurance proposal from Hauser and petitioner Marcello that was sent to petitioner Roemer on November 2, 1979. As the district court stated (82-29 Pet. App. A76, A79-A80), "[t]hroughout the course of their dealings with the [undercover] agents Marcello and Roemer had requested a written proposal from Hauser and the agents for Roemer's use in transferring the state insurance contract from its existing carrier to the undercover agents. * * * * * The proposal was prepared and placed in the mail as a result of persistent requests by the defendants that Hauser and the agents provide Roemer with just such a written proposal."

With particular regard to Roemer, "[i]n their earliest meetings, Roemer had suggested that Hauser send him a written proposal concerning the insurance contract * * *" (83-29 Pet. App. A80; see also Tr. 859-860, 4284-4285, 6126-6127; Gov't Exh. 58, at 4, 6-7, 9). In addition, Roemer "made his assistant * * * available to provide information needed for preparation of the proposal" (83-29 Pet. App. A80; see also Tr. 860-861, 4285, 6128-6129; Gov't Exh. 56, at 1-6). Subsequently Roemer began "to press" for the proposal (83-29 Pet. App. A80): he asked for the proposal when he met with Marcello on September 21 (Tr. 8615-8616), when he met with Hauser on September 25 (83-29 Pet. App. A80), when he met with Marcello and Hauser on

October 11 (*id.* at A80-A81), and when he spoke with Marcello on November 2, 1979, and said that he " 'need[ed] to see somethin', what their proposal is' " (*id.* at A81). In addition, Roemer expressed his "eagerness to receive the proposal by almost any means available" (*id.* at A83).

On November 2, the proposal was mailed to Roemer after "Marcello had reviewed it approvingly" (83-29 Pet. App. A78). Marcello then called Roemer to assure him "that the proposal he desired was on its way * * *" (*id.* at A81). After being told that the proposal had been mailed, Roemer replied, " 'Okay. That's good then' " (*id.* at A97).

Based on this record, it is clear that Roemer knew that the mails were being used to execute the scheme and that he agreed to and approved of such use. As the district court concluded, "there was ample evidence * * * to support a finding that both defendants actually agreed to use the mails * * * as part of their agreement * * * * *. [T]he evidence * * * shows not only the expectation that the mail * * * would be used to further the scheme, but also the defendants' assent and approval of the use of those means of effecting the plan" (83-29 Pet. App. A95, A98; see also *id.* at A83). And, in affirming the district court's determination, the court of appeals specifically noted (*id.* at A3 n.1) that "there was sufficient evidence to support the finding of agreement by Roemer to commit mail fraud," and it expressly accepted the finding of the defendants' " 'expectation' " and " 'assent and approval' " of the use of the mails (*ibid.*).

Furthermore, the interstate nature of the operation was fully apparent to petitioners at all times. "Both Marcello and Roemer knew from the outset of their dealings with Hauser and the agents that their operation was based in California" (83-29 Pet. App. A95). Petitioners were "kept * * * apprised, often at [their] requests, of the[] travel plans

[of Hauser and the agents]" (*ibid.*). And the "scheme in which the defendants were involved was broad in scope * * *" (*ibid.*). Given "[t]he nature of the plan to obtain the state insurance contract and the fact that the defendants knew the Hauser group was based cross-country[,] * * * the defendants contemplated the use of the mail * * * which occurred in furtherance of the scheme" (*id.* at A96).[10]

Accordingly, this is not a case in which government agents introduced a federal nexus into what was otherwise an entirely local offense. Rather, by the nature of their scheme, petitioners were "engaged in activities of an interstate character." *United States* v. *Brooklier*, 685 F.2d 1208, 1217 (9th Cir. 1982), cert. denied, No. 82-1013 (Feb. 22, 1983); *United States* v. *Perrin*, 580 F.2d 730, 736 (5th Cir. 1978), aff'd, 444 U.S. 37 (1979).[11]

For these reasons, *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), upon which petitioner relies (83-29 Pet. 16-17), is inapposite. In that case, the court reversed convictions on the ground that the federal agents had deliberately

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[10]The district court also concluded (83-29 Pet. App. A95, A98) that petitioners contemplated and agreed to use interstate telephone facilities in furtherance of their scheme. Because no challenge is raised here to the validity of the predicate act of wire fraud (see page 10, *supra*), that evidence need not be discussed. See, *e.g.*, Tr. 8615-8619; Gov't Exh. 21; Gov't Exh. 28; Gov't Exh. 34; Gov't Exh. 40; Gov't Exh. 47; Gov't Exh. 58, at 6, 8-9; Gov't Exh. 62; Gov't Exh. 71; Gov't Exh. 74; Gov't Exh. 77, at 8; Gov't Exh 99; Gov't Exh. 109-110, p.32. We point out, however, that this evidence further establishes both the interstate character of the scheme and petitioners' awareness of the interstate activity that occurred in pursuance of the scheme.

[11]Thus, petitioner's extensive quotation (83-29 Pet. 18 n.20) from Judge Swygert's dissenting opinion in *United States* v. *Craig*, 573 F.2d 455, 505 (7th Cir. 1977), is inapt. The offense in this case was not a "local matter" expanded into a federal prosecution by "fortuit[ies]" or "mere technicalities * * * [of] federal jurisdiction" (*ibid.*). Petitioners willingly and deliberately participated in a variety of interstate activities that were "an integral part of the scheme" (*ibid.*).

fabricated federal jurisdiction by making and causing the defendants to make long-distance telephone calls that served no purpose other than to provide the jurisdictional basis for converting a state offense into a federal crime. Here, in contrast, "federal jurisdiction was not created solely and impermissibly by the activities of government agents in the manner prohibited by the *Archer* case" (83-29 Pet. App. A68). See also *United States* v. *Pecora*, 693 F.2d 421, 424 (5th Cir. 1982), cert. denied, No. 82-1595 (June 13, 1983); *United States* v. *Bagnariol, supra*, 665 F.2d at 897-898; *United States* v. *Perrin, supra*, 580 F.2d at 736. Indeed, the Second Circuit has itself interpreted *Archer* in a manner inconsistent with petitioner's argument. On rehearing, the court explained that it had gone "no further than to hold that when the federal element in a prosecution under the Travel Act is furnished *solely* by undercover agents, a stricter standard is applicable * * *" (*United States* v. *Archer, supra*, 486 F.2d at 685-686 (emphasis added)). And the Second Circuit has subsequently observed that *Archer* was grounded in both "unsavory police practices" and the "government's initiation of the interstate aspect of the criminal activity * * * " (*United States* v. *Herrera*, 584 F.2d 1137, 1146 (2d Cir. 1978)), neither of which is present here. See also *United States* v. *Gambino*, 566 F.2d 414, 419 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978).

Finally, the district court expressly found (83-29 Pet. App. A68) that the government's involvement "was not so unusually pervasive as to violate those notions of justice and fair play embodied in our concept of due process and necessary for the proper administration of our criminal justice system." Nor did the government's conduct exceed "the bounds of legitimate undercover law enforcement techniques" (*id.* at A83). Rather, the "evidence shows that the Brilab undercover operation in Louisiana merely afforded the opportunites and facilities for the commission

of an offense," with the "general thrust of the scheme, the specific direction it took, and the details of its execution, as well as the federal jurisdictional elements, * * * [being] provided by the defendants" (*id.* at A84). These conclusions, accepted by the court of appeals and well buttressed by the evidence of petitioners' involvement in and substantial direction of the scheme, refute Roemer's claim that his conviction should be reversed "either under due process principles or under the Court's supervisory power" (83-29 Pet. 20).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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